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CASES CITED.

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ACTS OF CONGRESS.

MISCELLANEOUS CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

UNITED STATES, APPELLANT,
v.
W. J. MORRISON, FINLEY MORRISON, and the Sligh Furniture Company. | No. 138

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

(The opinions of the lower courts will be found in the Record at pp. 12, 37, and in 202 Fed. 217, and 212 Fed. 29.)

STATEMENT.

This is a suit by the Government to quiet its title to 580 acres of land in sec. 16, T. 3 S., R. 6 E., of the Willamette meridian in the State of Oregon. The defendants and appellees in this court claim that the title to the lands involved inured to the State of Oregon as a part of its school grant under the act of February 14, 1859 (11 Stat. 383) (R. 10), while the Government contends that prior to the survey

the lands were withdrawn from disposition and included in a forest reserve by Executive order, by reason of which the title to the State never attached (R. 2).

The case was tried upon an agreed statement; consequently there is no dispute as to the facts, which are as follows: Prior to May 27, 1902, no survey of any kind had been made by the United States of the lands involved. On June 2, 1902, a field survey was made under the direction of the United States surveyor general for the State of Oregon of the north, west, and south boundaries of the township and the subdivisions of lands included therein. According to that survey the lands were described as being within sec. 16, T. 3 S., R. 6 E. This survey was approved by the surveyor general June 2, 1903, and on the 8th of June following he forwarded copies of the plat of survey and field notes to the Commissioner of the General Land Office at Washington, D. C. The survey was accepted by the commissioner January 31, 1906, and on November 16, 1907, he directed the surveyor general to place a plat of the survey in the United States local land office at Portland, Oreg. The plat was filed in the local land office at Portland on November 16, 1907, in substantially the same form in which it was accepted by the surveyor general, without change or correction thereof (R. 19).

On December 16, 1905, the Secretary of the Interior, by an order of that date, temporarily with-

drew for forest purposes, from all forms of disposition whatsoever, except under the mineral laws, all the vacant and unappropriated public lands within a specified area, which included all of T. 3 S., R. 6 E., and in December of that year the commissioner sent a telegram to the register and receiver at Portland informing them of the withdrawal and stating that it had been made for forestry purposes; December 19 a letter was sent by the commissioner to the register and receiver furnishing them the same information. The withdrawal order so made by the Secretary of the Interior and the Commissioner of the General Land Office described the lands according to the rectangular system of Government survey (R. 19-20).

January 25, 1907, the President issued a proclamation enlarging the Cascade Range Forest to include, in addition to the lands theretofore embraced within it, the lands involved in this suit, and by that proclamation it was provided that all lands which at its date were embraced in any withdrawal or reservation for any use or purpose to which the reservation for forest uses was inconsistent were excepted from the force and effect of the proclamation. On October 10, 1906, the State of Oregon, in pursuance of its laws providing for the disposal of lands owned by the State, executed and delivered a certificate of sale of the southeast quarter of the section involved to Robert F. Louden, and executed and delivered a similar certificate covering the south half of the northeast and the northwest quar-

ter of the northwest quarter to Alvina S. Louden, who thereafter assigned and transferred the certificates to the defendants, Morrison, to whom, on January 9, 1907, the State of Oregon, by its proper officers, executed and delivered a deed of conveyance granting to them the lands immediately above described (R. 20). On July 1, 1910, the defendants, Morrison, executed and delivered a warranty deed conveying the land to the defendant, Sligh Furniture Co., a corporation (R. 21).

Forming a part of the agreed statement are copies of letters, from which it appears that on October 13, 1904, the Commissioner of the General Land Office acknowledged the receipt of the surveyor general's letter forwarding the returns of the survey and called attention to the fact that the deputies had failed to comply with the requirements of the manual of surveying instructions by omitting to describe the kind of instrument employed in the work or to record any Polaris or solar observations at that time, in view of which the surveyor general was directed to notify the deputies that before any further action would be taken looking to an acceptance of the survey it would be necessary for them to file a supplemental report showing a compliance with the manual in the matters mentioned (R. 23, 24). The supplemental showing was forwarded to the commissioner by the surveyor general on September 8, 1905 (R. 24), receipt of which was acknowledged by the commissioner January 31, 1906 (R. 24). In that letter

the commissioner stated that the completed returns had been compared with the report of the examiner of surveys who examined the work in the field, and that, while he had not recommended that the survey be accepted, the examiner stated that the work was in fairly good condition. The commissioner stated, however, that considering the surface conditions and that the errors found were few and not very great, the office had concluded to accept the survey, and the surveyor general was authorized to file the triplicate plats in the local land office. It was further stated that no entries should be allowed until further notice, as the survey was accepted for payment only (R. 25). On November 16, 1907, the surveyor general was directed by the commissioner to place the plat on file in accordance with the general instructions of October 21, 1885 (4 L. D. 202), to the end that entries based upon prior settlement might be allowed in accordance therewith, and on November 23 the surveyor general advised the register and receiver accordingly (R. 26–27).

A certificate from the register of the land office at Portland shows that the plat was received in his office on February 7, 1906, and the lands became subject to entry on January 8, 1908, at 9 o'clock a. m. (R. 27).

The legislation providing a grant for the support of common schools in the State of Oregon will be found in the following statutes:

The act of August 14, 1848 (9 Stat. 323), establishing a Territorial government in Oregon, provided in section 20:

> That when the lands in the said Territory shall be surveyed under the direction of the Government of the United States, preparatory to bringing the same into market, sections Nos. 16 and 36 in each township in said Territory shall be, and the same is hereby, reserved for the purpose of being applied to schools in said Territory and in the States and Territories hereafter to be erected out of the same.

The act of September 27, 1850 (9 Stat. 496), creating the office of surveyor general of the public lands in Oregon, and making donations to settlers, declared:

> That no claim to a donation right under the provisions of this act upon sections 16 or 36 shall be valid or allowed if the residence and cultivation upon which the same is founded shall have commenced after the survey of the same.

The act of February 19, 1851 (9 Stat. 568), authorizing the legislative assemblies of the Territories of Oregon and Minnesota to take charge of the school lands of said Territories, authorized the governors and legislative assemblies of the Territories—

> to make such laws and needful regulations as they shall deem most expedient to protect from injury and waste sections numbered

> sixteen and thirty-six in said Territories reserved in each township for the support of schools therein.

By the act of February 14, 1859 (11 Stat. 383), for the admission of Oregon into the Union there were offered to the people of Oregon for their acceptance or rejection, which if accepted should be obligatory upon the United States and upon the State certain propositions, among which was the following:

> That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections or any part thereof has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools.

This proposition and others offered to the State were accepted by the act of legislative assembly on June 3, 1859. (R. 40.)

The district court rendered an opinion holding that the grant to the State did not take effect until the lands were surveyed, and that lands are not to be deemed surveyed unil the plat of survey has been accepted by the Commissioner of the General Land Office and filed in the local land office pursuant to his directions. (R. 12–16.) In accordance with that opinion a decree was entered granting the prayer of the bill and quieting title in the United States (R. 17), from which the defendants sued out an appeal to the circuit court of appeals for the ninth circuit. (R. 29.)

The circuit court of appeals, by a divided court, reversed the action of the district court and dismissed the bill (R. 49). The majority opinion holds that the legislation above cited granted to the State of Oregon for school purposes all the sixteenth and thirty-sixth sections, to which no right of any third party attached prior to the proper identification of such sections; that the identification of the lands in controversy was first made by the field survey in June, 1902; that such survey was approved by the surveyor general on the same day (an apparent error, as the survey was approved just one year later, 1903) and forwarded to the Commissioner of the General Land Office, where it remained unaltered until it was expressly approved on January 31, 1906, and where in the meantime it received recognition and was acted upon to identify the lands in question by the Commissioner of the General Land Office and the Secretary of the Interior, when in December, 1905, they issued the order of withdrawal relied upon by the Government; that the mere fact that there was a delay of three and a half years in the express approval by the commissioner was unimportant, as the approval when made under the doctrine of relation related back to the inception of the proceedings (R. 37–44).

Presiding Judge Gilbert rendered a dissenting opinion, holding that until the lands were surveyed no title vested in the State and that the decree of the lower court should be affirmed. (R. 44–48.)

STATEMENT OF THE ARGUMENT.

I.

The grant of school lands made to the State of Oregon by the act of February 14, 1859 (11 Stat. 383), did not operate to vest title in the State to any particular tract of land until the same was surveyed under the authority of the United States.

II.

Public lands of the United States are not surveyed until the plat and field notes thereof are approved by the Surveyor General, accepted by the Commissioner of the General Land Office, and filed in the local land office.

HISTORY OF THE SCHOOL LAND LEGISLATION.

Before proceeding with the argument proper, we shall review briefly the history of the legislation enacted by Congress providing for grants to the several States in aid of common schools.

The policy of providing for schools by making grants of land seems to have had its inception in the early days of the Continental Congress, when by an ordinance adopted May 20, 1785, respecting the disposition of the lands in the western territory, it was provided that—

> There shall be reserved the lot numbered sixteen of every township for the maintenance of public schools within said township.

This is said to have been—

> a reservation by the United States, and advanced and established a principle which finally dedicated one thirty-sixth part of all public lands of the United States, with certain exceptions as to mineral, etc., to the cause of education by public schools. (Public Domain, p. 224.)

After the establishment of the Union under the Federal Constitution of 1787, Congress by the act of April 30, 1802 (2 Stat. 173), authorizing the formation of a State government by the people of Ohio, submitted the following proposition, which was subsequently adopted by the State:

> That the section numbered sixteen in every township and where such section has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools.

In pursuance of the policy so established 12 public-land States, or all such admitted prior to the admission of California in 1850, received a grant of one section, No. 16, for the support of common schools, and thereafter the new States received two sections, Nos. 16 and 36, with the exception of Utah, Oklahoma, New Mexico, and Arizona, all of which were granted these sections and others in addition.

For example, Missouri, Michigan, and Wisconsin received only the sixteenth section, while Oregon, Minnesota, and Nevada received the sixteenth and

thirty-sixth sections. The grants made to these States are specially mentioned because we propose to consider them further in the light of adjudicated cases arising thereunder.

Until May 20, 1826, no provision had been made for a school grant in those townships in which no section 16 was returned by the survey, and on that date Congress passed an act which provided (4 Stat. 179):

> That to make provision for the support of schools, in all townships or fractional townships for which no land has been heretofore appropriated for that use in those States in which section number sixteen, or other land equivalent thereto, is by law directed to be reserved for the support of schools, in each township, there shall be reserved and appropriated, for the use of schools, in each entire township or fractional township for which no land has been heretofore appropriated or granted for that purpose the following quantities of land, to wit: For each township or fractional township containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township containing a greater quantity of land than one-half and not more than three-quarters of a township, three-quarters of a section; for a fractional township containing a greater quantity of land than one-quarter and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land

than one entire section and not more than one-quarter of a township, one-quarter section of land.

Later similar provision was made by the act of February 26, 1859 (11 Stat. 385), to compensate for deficiencies on account of the grant of section 36, and was extended to those States entitled to that section for school purposes. These acts were subsequently incorporated into the Revised Statutes as sections 2275 and 2276, which were amended by the act of February 28, 1891 (26 Stat. 796), to read as follows:

SEC. 2275. Where settlements with a view to preemption or homestead have been or shall hereafter be made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers, and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, where sections sixteen or thirty-six are mineral land or are included within any Indian, military, or other reservation, or are otherwise dis-

posed of by the United States: *Provided,* Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however,* That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain

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and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

SEC. 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township containing a greater quantity of land than one-half and not more than three-quarters of a township, three-quarters of a section; for a fractional township containing a greater quantity of land than one-quarter and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section and not more than one quarter of a township, one-quarter section of land: *Provided*, That the States or Territories which are or shall be entitled to both the sixteenth and thirty-sixth sections in place shall have the right to select double the amounts named to compensate for deficiencies of school land in fractional townships.

ARGUMENT.

I.

The grant of school lands made to the State of Oregon by the act of February 14, 1859 (11 Stat., 383), did not operate to vest title in the State to any particular tract of land until the same was surveyed under the authority of the United States.

The legislation briefly outlined above clearly shows that Congress intended that each public-land State should receive a definite proportion of the lands within its borders for common-school purposes, but it also shows with equal clearness that Congress was not so much concerned in seeing that the States received title to any particular section or sections as it was in seeing that they received a definite quantity. At first each State was to receive one section, or one-thirty-sixth part of all the public lands included within its boundaries. Later this was increased to 2 sections, or one-eighteenth of all the lands, and still later this was further increased to one-ninth; that is, 4 sections in every township of 36 sections.

Some townships are fractional. They do not contain a full quota of 36 sections of 640 acres each. This may result from a number of causes, both natural and artificial, as where a portion of the township is covered by permanent bodies of water and where the boundaries of one State end and those of another begin. Moreover, in all of the

States admitted into the Union prior to 1826 there were areas, more or less large, that had been confirmed as private claims, having their origin under a prior sovereignty, and in such cases it not infrequently occurred that what would be ordinarily surveyed as section 16 was covered by a private claim, in which event a State would receive no school land in such township. It was to meet these conditions that the acts of May 20, 1826, and February 26, 1859, *supra,* were passed.

Examining these acts we find that the grant of a definite quantity, with no special location, is couched in substantially the same language as the grant of a specific section, to wit:

> There shall be reserved and appropriated for the use of schools, in each entire township, or fractional township, for which no land has been heretofore appropriated or granted for that purpose, the following quantities of land. * * * (Act of 1826, supra.)
>
> And other lands are also hereby appropriated to compensate deficiencies for school purposes, where said sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. (Act of 1859.)

While the language used in these acts imports a present grant, it is clear that no title could vest to any particular tract until some action was taken to identify it either by the grantor or grantee or both. This is illustrated by the decision in *Les-*

sieur v. *Price* (12 How. 59), involving a grant of four sections of land for the seat of government of the State under the act of March 6, 1820 (3 Stat. 545), for the admission of the State of Missouri. The grant thus made is found in the fourth paragraph of section 6 of the act:

> That four entire sections of land be, and the same are hereby, granted to the said State for the purpose of fixing their seat of government thereon; which said sections shall, under the direction of the legislature of said State, be located, as near as may be, in one body, at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States.

It is true that in the course of its decision this court said that the land was granted by the act of 1820 and that it was a present grant wanting identity to make it perfect, and, furthermore,

> that the act of 1820 vested the title in the State of Missouri of four sections;

but the court did not stop here. It proceeded to say that as the officers of the State had power to locate the land, and did so, subject to legislative sanction of their action, and as their action was sanctioned, therefore

> the State took title from the twenty-eighth of June, eighteen hundred and twenty-one, when the surveyor general was notified that the location had been made (p. 77).

We submit that as a grant in quantity without definite description can attach to no specific tract until it is located by the act of the parties, or one of them at least, so a grant of a specific section can not attach to any particular land until the section is brought into existence by a survey, because until the survey is made the section does not actually exist as such. We believe this proposition finds support in all the adjudicated cases, the most important and pertinent of which we shall now consider.

Ham v. *Missouri* (18 How. 126), so much relied upon by the appellees, involved title to section 16, claimed by the State under the enabling act of 1820, *supra*, which provided in section 6:

> That section numbered sixteen in every township, and when such section has been sold, or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of the inhabitants of such township for the use of schools.

The defendant Ham, who was indicted for trespass, claimed title under a private claim, which was not confirmed until December 24, 1828. It was contended in his behalf, however, that the act of March 3, 1811 (2 Stat. 662), prohibited the sale of lands embraced in a claim pending before the board of commissioners until after the decision of Congress thereon, and that prohibition was sufficient to prevent a donation for schools. This court held, how-

ever, that the act of 1811 did not prevent a donation for schools and, moreover, that the confirmation of the private claim by the act of 1828 was only a relinquishment of such title as the United States had at the date of the law, and was expressly declared—

> to have no influence to prejudice the rights of third persons, nor any title heretofore derived from the United States, either by purchase or donation (p. 133).

In the meantime the donation to the State had been made by the act of 1820 and the section had been identified by survey. While it does not appear from the court's opinion, as rendered by Mr. Justice Daniel, when the section 16 was surveyed as such, it is shown by the concurring opinion of Mr. Justice Nelson that the public surveys of the township were made before the passage of the confirmatory act of 1828, and it was in view of that fact that he concurred in the judgment of the court (p. 134).

The grant to the State of Michigan was made by the act of June 23, 1836 (5 Stat. 59), which declared:

> That section numbered sixteen in every township of the public lands, and where such section has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to the State for the use of schools.

This act was involved in *Cooper* v. *Roberts* (18 How. 173), another case upon which the appellees

seem to rely with confidence. The plaintiff in that case held under a patent issued by the governor of Michigan in November, 1851, upon a sale made pursuant to the laws of the State in February of that year. The defendant relied upon an entry allowed by the Secretary of the Interior in 1852 with a reservation of the rights of the State. The section numbered 16 was surveyed in the summer of 1847, which, it will be observed, was prior to the defendant's entry, application for which was not even made until November, 1850.

This court held the title of the State to be superior to that derived from the entry allowed by the Secretary of the Interior, and in so doing said (p. 179):

> We agree that until the survey of the township and the designation of the specific section the right of the State rests in compact, binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant, but when the political authorities have performed this duty the compact has an object upon which it can attach, *and if there is no legal impediment the title of the State becomes a legal title.* [Italics ours.]

The conclusion of the court was in accord with what it said, namely, that the title to section No. 16 was vested in the State of Michigan at the date of the entry by the Minnesota Mining Company. That

was the entry upon which the defendant relied, and it was made in 1851, some four years after the school section had been surveyed.

The school grant made to the State of Wisconsin by the enabling act of August 6, 1846 (9 Stat. 56), is almost identical in language with that made to Michigan, and was construed by this court in *Beecher* v. *Wetherby* (95 U. S. 517); *United States* v. *Thomas* (151 U. S. 577), and *Wisconsin* v. *Hitchcock* (201 U. S. 202).

We concede that there is difficulty in reconciling some things said in *Beecher* v. *Wetherby* with the conclusions reached by the court in the two other cases cited involving the same law, but the inconsistencies, if any, exist in what was said rather than what was decided in the first case. The land there involved was formerly a part of the Menominee Indian Reservation, to which the Indians held only the right of occupancy. The township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. By the treaty of May 12, 1854 (10 Stat. 1064), ratified in August of that year, a reservation was made for the Menominees which included this section. Afterwards a portion of the reservation made by the treaty of 1854, including the tract in controversy, was ceded to the Stockbridge and Munsee Indians, and by the act of February 6, 1871 (16 Stat. 404), Congress authorized a sale of the land for the benefit of the Indians. Beecher claimed under patents issued by the United States in 1872

pursuant to the act last cited, while Wetherby claimed under patents issued by the State in 1865 and 1870.

This court held the State patents valid, saying that it would not be supposed that Congress by the act of 1871 intended to authorize a sale of land "which it had previously disposed of." The court took occasion to observe, however, that the Indians had removed from the land and other sections had been set apart for them (p. 527), and it is probable that this fact controlled the decision. If not, and the court intended that the school section was literally "disposed of" to the State by the granting act and as of that date, we submit that that holding finds no support in later decisions involving this same grant.

In *United States* v. *Thomas, supra,* the defendant, an Indian, was indicted for murder of a half-breed of the same tribe within the limits of La Court Oreilles Indian Reservation, in Wisconsin. The evidence showed that the offense was committed on section 16, embraced within the reservation, because of which it was contended that the Federal court had no jurisdiction. A verdict of guilty having been returned, a motion to set it aside was made and argued before the circuit judge and the district judge, who differed in opinion. The circuit judge held that the title to the section upon which the offense was committed was in the State of Wisconsin from the time of its admission into the Union, and consequently the land could not afterwards be

used by the United States as a part of an Indian reservation. The district judge, on the other hand, held that the right of occupancy of the Chippewa Indians to the land composing the reservation had never been divested, and until so divested the title to section 16 could not vest in the State under its enabling act. From the date of the treaty concluded October 4, 1842, proclaimed in March following (7 Stat. 591), between the United States and the Chippewa Indians, the latter had the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President. They were not removed from the lands thus ceded and no change had taken place in their occupancy until by the treaty of September 30, 1854 (10 Stat. 1109), the land on which the offense was committed was included in a reservation established for them. This was prior to the survey of the land, which was not made until 1855. Upon that state of facts this court held that—

> When the townships composing these reservations were surveyed the sixteenth section was already disposed of, in the sense of the enabling act of eighteen hundred and forty-six. It had been included within the limits of the reservations (p. 582).

The court did not base its conclusions solely upon the right of occupancy retained by the Indians when they ceded the lands under the treaty of 1842, but said (p. 584):

> So, by authority of their original right of occupancy, *as well as by the fact* that the section is included within the tract set aside as a portion of the permanent reservation in consideration of the cession of lands, the title never vested in the State except as subordinate to that right of occupation of the Indians.

In the course of its decision the court took occasion to quote from a decision of Mr. Justice Lamar while Secretary of the Interior (6 L. D. 418), saying that he had frequent occasions to consider the nature and effect of the school-land grant where the title was at all incumbered or doubtful, and on that subject had said that the true theory was this:

> That where the fee is in the United States at the date of survey, and the land is so incumbered that full and complete title and right of possession can not then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the right and title of possession unite in the government and then satisfy its grant by taking the lands specifically granted. (p. 583).

The treaties involved in *United States* v. *Thomas* were again before this court in *Wisconsin* v. *Hitchcock, supra,* the particular land in controversy being within the reservations made for the La Pointe and Lac de Flambeau Bands of Indians. While the exterior lines of the townships were surveyed prior to the treaty of 1854, it seems that the subdivisional

lines had not been run at the time of the establishment of the permanent reservation for the Indians. A suit was brought by the State of Wisconsin against the Secretary of the Interior to restrain him from allotting the lands embraced in section 16. This court followed the rule laid down in *United States* v. *Thomas*, quoting freely therefrom and saying:

> We could not sustain the claim of the State in the present suit without overruling the principles announced in the Thomas case, and that we are not disposed to do. The principles of the Thomas case were recognized and enforced in *Minnesota* v. *Hitchcock*, 185 U. S. 373, 391 *et seq.*, which related to an act of Congress for the admission of Minnesota into the Union, which act contained a provision similar to the one found in the enabling act for Wisconsin, namely, that certain sections "in every township, of public lands in said State, and where either of said sections or any part thereof has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be shall be granted to said State for the use of schools" (p. 215).

The grant to Minnesota, as stated by this court in the Wisconsin case, is similar to that made to the latter State, except that the State of Minnesota was granted section 36 as well as section 16 in every township (11 Stat. 166). In *Minnesota* v. *Hitchcock* (185 U. S. 373), the State attempted to restrain the Secretary of the Interior from ~~making allot~~ selling

~~inests~~ on sections 16 and 36 within the Red Lake Indian Reservation, pursuant to the provisions of the act of January 14, 1889 (25 Stat. 642). This court said that whether the land known as the Red Lake Indian Reservation was properly called a reservation or merely unceded Indian country, as the plaintiff insisted, was a matter of little moment; that the fee was in the United States subject to the right of occupancy by the Indians, and as the agreed statement of facts upon which the case was tried showed that the lands were not surveyed until after the act of January 14, 1889, and the agreement with the Indians made in pursuance thereof, the court held that the Secretary of the Interior could not be interfered with in his attempts to ~~allot~~ sell the lands ~~to the Indians~~, saying:

> Before any survey of the lands, before the State rights had attached to any particular sections, the United States made a treaty or agreement with the Indians by which they accepted a cession of the entire tract under a trust for its disposition in a particular way (pp. 398–399).

Accordingly the bill of the State was dismissed.

The school grant to the State of Nevada was made by the seventh section of the enabling act of March 21, 1864 (13 Stat. 30), in the following language:

> That sections numbers sixteen and thirty-six, in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equiva-

> lent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be, shall be, and are hereby, granted to said State for the support of common schools.

That act was considered by this court in *Heydenfeldt* v. *Daney Gold and Silver Mining Company* (93 U. S. 634). The plaintiff in that case claimed under a patent issued by the State of Nevada July 14, 1868, for a portion of section 16, while the defendant relied on a patent granted by the United States March 2, 1874, conveying a portion of the same land as a mineral claim that had been located and occupied since 1867, which was prior to the date of the survey or approval of the survey of section 16 by the United States. The trial court found that the act of Congress making the grant to Nevada did not constitute a grant *in praesenti*, but an inchoate, incomplete grant until the premises were surveyed by the United States and the survey properly approved. The action of the trial court was affirmed by the supreme court of the State and the plaintiff sued out a writ of error to this court, where the action of the State courts was affirmed.

It will be observed that the words of the grant to Nevada are words of present grant, notwithstanding which this court said that—

> until the *status* of the lands was fixed by a survey and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any

> part of a sixteenth or thirty-sixth section had been disposed of, the State was to be compensated by other lands equal in quantity and as near as may be in quality (p. 640).

In the course of its decision the court said that when the enabling act was passed the school sections had not been surveyed, nor had Congress then made or authorized to be made any disposition of the national domain within that Territory, but that this condition of things did not deter Congress from making the necessary provision to place Nevada in this respect on an equal footing with the States previously admitted; that her people were not interested in getting the identical sections 16 and 36 in every township—indeed, it could not be known until after survey where they would fall—and the grant of quantity placed her in as good a condition as other States which had received the benefit of the bounty; further, that a grant operating at once and attaching prior to the surveys by the United States would deprive Congress of the power of disposing of any lands in Nevada until they were segregated from these grants, and in the meantime improvements would be arrested, and persons who, prior to the surveys, had occupied and improved the country might lose their possessions and labor; that the provision for taking indemnity where the school sections had been previously disposed of was not confined to past sales or dispositions, but to have any effect at all must be held to apply to future sales; that is, to sales or

dispositions found to have been made when the sections became identified by survey. The court further observed that the mineral act of July 26, 1866, passed before the land in controversy was surveyed, provided a method for the acquisition of the title to mineral land, and thus furnished protection to the person exploring for minerals.

In this connection it is worthy of note that the Nevada enabling act was passed in 1864, more than two years before the law authorizing the acquisition of title to mineral lands was enacted in July, 1866, and the right of the State to the land was denied not merely because the land was mineral, but solely because no title vested in the State until the lands were identified by survey, and before the survey was made the Federal Goverenment, having the power of disposition, passed the mineral act of 1866 and thereby provided a means whereby a citizen could acquire title to land of the character designated. We submit that this case is directly in point and definitely establishes the proposition for which we are here contending, namely, that until the lands are surveyed the title to the State does not vest, and if in the meantime Congress, or the executive department acting under authority of Congress, makes other disposition of the land, the title of the State never attaches and it is relegated to its right of indemnity.

This is in accord with the rule uniformly adopted by the Land Department (6 L. D. 412; 24 L. D. 54; 34 L. D. 657; 35 L. D. 171) and finds strong support

in the general congressional legislation respecting school grants to the various States. The act of February 28, 1891, *supra*, amending sections 2275–2276, Revised Statutes, expressly grants other lands, to be selected by the States, where the school sections are "mineral lands or are included in any Indian, military, or other reservation, or otherwise disposed of by the United States." All of the public-land States, including the State of Oregon, have accepted the benefits conferred by this act—benefits which they did not have under the original granting acts; for example, the States are not required to make their lieu selections as contiguous as may be to the school sections in lieu of which the indemnity is taken. The act is broad. The States may go anywhere within their borders. They need not await the extension of the public surveys over reservations before making indemnity selections on account of unsurveyed school sections situate within the various reservations created by the National Government, but the number of townships may be ascertained by protraction or otherwise. This provision of itself clearly recognizes the power of the Executive to include unsurveyed areas, necessarily embracing unsurveyed school sections, in reservations for national purposes, so as to prevent the States' title from vesting when the surveys are made.

The act of 1891 thus imports a legislative construction of all previous laws making grants to the various States for school purposes, entirely in ac-

cord with the Government's contention in this case, and many thousands of transactions, involving millions of acres, have been based upon it.

The right to take indemnity is of far greater value than the mere right to take a certain section wherever it may happen to be surveyed; where indemnity is allowed, choice land may be selected, while in the other case there is no right of selection, but the section in place must be taken, be it good, poor, or indifferent. The States have been quick to see this and, as indicated, have freely availed themselves of the advantage.

In this connection it may be stated, as shown by the letter from the Secretary of the Interior appended to this brief, that the State of Oregon has taken indemnity for the 80 acres of the identical school section involved in this case that it did not sell, and has also taken indemnity for substantially all of the other school section in the township No. 36, assigning as a reason therefor the inclusion of the lands in a national forest. Moreover, this letter shows that the indemnity so taken was in a remote part of the State.

This general subject and the effect of the act of 1891 upon the special acts providing for the various States is fully discussed by the Secretary of the Interior in a letter to the attorney general for the State of Montana, dated September 30, 1909, where, after citing decisions of the department and the courts, it is said that they have uniformly held that

the grant of sections 16 and 36 to a State does not vest until the lands are identified by survey, and the date of the survey is not fixed by the time the work is done in the field, but by the approval of the township plat by the proper authority (38 L. D. 247).

II.

Public lands of the United States are not surveyed until the plat and field notes thereof are approved by the Surveyor General, accepted by the Commissioner of the General Land Office, and filed in the local land office.

By section 1 of the act of July 4, 1836 (5 Stat. 107), providing for the reorganization of the General Land Office, Congress declared:

> That from and after the passage of this act the executive duties now prescribed or which may hereafter be prescribed by law appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands; and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office under the direction of the President of the United States.

This law is incorporated in the Revised Statutes as section 453, which provides that—

> The Commissioner of the General Land Office shall perform, under the direction of

> the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

This court has said that by the foregoing laws plenary powers are conferred on the commissioner to supervise all surveys of public lands. (*Maguire* v. *Tyler,* 1 Black, 195, 202.)

Public lands are surveyed by a deputy surveyor appointed for that purpose, who runs the lines upon the ground, making notes as he does so, and these notes, called field notes, constitute the basis of the plat which is subsequently prepared therefrom. The plat and field notes so prepared are examined by the surveyor general of the district and, if found satisfactory, are approved by him and forwarded to the General Land Office, where they are further examined and accepted or rejected as the facts may justify.

If the survey is found to be unsatisfactory, a resurvey is ordered, in whole or in part, as the circumstances require; while, if satisfactory, it is accepted by the commissioner and a copy of the plat ordered filed in the local land office of the district in which the land is situated.

Prior to April 17, 1879, it seems to have been the practice of the Land Department for the surveyor general, upon approving a township survey, to for-

ward a copy of the plat directly to the local land office, where all entries for public lands are made, but by an order of the Commissioner of the General Land Office of April 17, 1879, this practice was changed, the reason therefor being stated in the order, which is as follows:

> Experience has shown that it is often necessary to order suspension of plats of survey in the local land offices and frequently the cancellation of the survey. Filing of the triplicate plats of survey in local land offices has frequenty led to complication of title and individual hardships to persons making entries according to such surveys in cases where it has been necessary to set aside or cancel them. For these reasons you will not, after receipt of this order, file duplicate (triplicate) plats in the local land office until the duplicates have been examined in this office and approved and you officially notified to that effect. (37 L. D. 165; see also 6 Copp's Land Owner, 136.)

Under this order, authority for which is plainly found in the statute, it is clear that a survey could not be legally placed of record in the local land office until after it had been accepted by the commissioner. Prior to that time, apparently, it could be so made of record merely upon the approval of the surveyor general, who was authorized to forward the triplicate plat to the local land office when approved by him (1 Lester, 723). But even at that time this making a record of a survey in the local

land office was considered necessary to a completion of a survey. Such was the holding of this court in *Barnard's Heirs* v. *Ashley's Heirs* (18 How. 43), where the court said:

> Our opinion is that the selection could only take effect from the 19th of July, 1834, when the township survey was sanctioned and became a record in the district land office (p. 46).

The language of the court in that case is quoted by the Secretary of the Interior in his decision of January 15, 1878, in the case of the *State of California* v. *Townsend* (2 Copp's Public Land Laws, 1117), thus showing that even before the issue of the order of 1879 directing plats to be submitted to the General Land Office and there accepted before filing in the local land office, it was recognized both by the courts and the Land Department that a survey was not completed until it was made of record in the proper manner in the appropriate local land office.

Since the promulgation of that order the Land Department has not regarded surveys of public lands complete so as to render them subject to disposition until the survey has been accepted by the commissioner and by him ordered filed in the local land office. In *Anderson* v. *State of Minnesota* (37 L. D. 390) there was involved the question of the right of a homestead settler to contest the surveyor's return of lands as swamp under a rule adopted by the Land Department to the effect that

the character of the land would be determined by the surveyor's return, except in those cases where the settler's claim was based upon settlement made prior to survey. In that case Anderson's settlement was made *after* the lines had been run in the field, *after* it had been accepted by the commissioner and ordered to be filed in the local office, but *before* the date upon which the filing in the local land office was to become effective. Even there the Secretary held that the survey was not complete until the date fixed for the opening of the lands to entry.

This court had occasion to consider the commissioner's order of April 17, 1879, in the case of *Tubbs* v. *Wilhoit* (138 U. S. 134), and did not question the propriety or competency of the order, but, on the contrary, appeared to recognize it as entirely valid, saying that it was not until after such instructions that the duplicate plats filed in the local land office were required to be previously approved by the Commissioner of the General Land Office. That it was entirely competent for the commissioner to promulgate the order clearly appears from the authority recognized by this court in *Knight* v. *U. S. Land Association* (142 U. S. 161) and *Michigan Land and Lumber Company* v. *Rust* (168 U. S. 589).

In the case of F. A. Hyde & Company (37 L. D. 164) the State of California had sold a portion of section 16 in the year 1900, and Hyde & Company, having purchased it from the State's patentee, relinquished it to the United States and made appli-

cation for lieu selection under the forest exchange act of June 4, 1897 (30 Stat. 36), the township in which the land was located having been withdrawn for a forest reserve on December 20, 1892. The township had been surveyed in the field prior to November 13, 1885, the date the surveyor general approved the plat, but it was not satisfactory to the commissioner, who withheld his approval until 1894. Upon that state of facts the Secretary held that the State's title to the school section had not vested when the land was withdrawn in 1892, and that the survey which had received the surveyor general's approval in 1885 was not complete in that it had not been accepted by the commissioner, as the regulations then in force required. Consequently the Secretary held that Hyde & Company, who purchased from the State's patentee, acquired no title to the base land offered in support of the selection, and the selection was accordingly denied.

Regulations of the Land Department have all the force and effect of law. They are made in furtherance of the statutes, which can not well be enforced without them. This general subject is discussed in well-considered decisions of the circuit court of appeals for the eighth circuit in the case of *Germania Iron Company* v. *James* (89 Fed. 811 and 107 ib. 597). The court was there considering the effect of a regulation which provided that upon the cancellation of an entry the land involved should not become subject to further entry or claim until the order of cancellation was received and made of

record in the local land office. While the particular question here at issue was not involved in that case, we feel that what the court said in the following quotation applies here with much force:

> * * * The acts of Congress gave ample power to the officers of the Land Department to make a rule and to establish and maintain a uniform practice upon this subject. (Rev. Stat. secs. 453, 2478.) The rule and practice which the bill alleges that the Land Department had established was reasonable and just. It was that, after a decision of the Secretary had been rendered that a former entry was void and should be canceled, no subsequent entry of the land could be made until that decision was officially communicated to the local land officers and a notation of the cancellation was made on their plats and records. The Secretary of the Interior is an appellate tribunal in these cases, whose court is held and whose decisions are filed more than 1,000 miles from most of the inferior tribunals in which the parties appear and institute and try their contests. It is according to the almost universal practice of judicial tribunals for the inferior court to take no action and to allow none to be taken in it until the decision and order of the appellate court has been officially received and recorded. The reasons for such a rule in the Land Department are far stronger and more imperative than in the ordinary courts of law or equity. It is in the local land office that the rights of the entrymen must be ini-

tiated as well as contested. The policy of the Government is to afford to the actual settlers, to the preemptors and homesteaders, to those who live on or near the public land to be disposed of, every facility to acquire it without burdensome expense or unnecessary trouble. The very existence of the local land offices is the outgrowth of the purpose of Congress to carry to the residents of the districts in which the lands are situated, not only the tribunals in which they may initiate and try their rights to obtain portions of the public domain, but all the information to enable them to intelligently prefer and establish their claims. To this end the surveyor of each district is required to transmit to the registers and receivers of the local land offices general and particular plats of all lands surveyed in their respective districts, and these registers and receivers are required to keep a record of all entries and cancellations on these plats and in their books so that any applicant for land may there learn when it is open for entry. To this end these plats and records in the local land office are declared to be open to public inspection, and the register and receiver are charged with the duty of giving correct information regarding them to every inquiring applicant. To this end applicants to enter the public land may not make their entries or institute their proceedings to obtain them in the General Land Office at Washington, but must first apply to the local land office of the district in which the lands are situated. (89 Fed. 814–815.)

The rule declaring that a survey is not complete until approved by the commissioner and filed in the local land office is a proper one, founded in reason and necessity. All entries and applications for the public lands are first filed in the local land office, and until the plat is filed and the survey thus made of record there the local land officers and those desiring to present claims have no means of identifying the lands. The lines may have been run in the field, but until the survey has been accepted by the final authority, the Commissioner of the General Land Office, it is subject to be set aside and a new one made, by which the location of every line will be changed and the position of every section altered. In one sense the land is surveyed after the line has been run, but so long as the work of the surveyor is subject to the approval of his superiors it can not be said to be complete until it has received their approval and until that approval has been promulgated in the manner prescribed in the regulations adopted by them.

While settlers who locate upon school sections after lines of survey have been run in the field acquire no rights, this is due to the express provision of the statute, because, ordinarily, the survey made by the deputy will be approved and accepted, and to permit a settler to avail himself of the advantage afforded by this notice would be unfair to the State; but in thus providing that a settler who awaits the running of the lines before locating his claim shall not be considered a settler prior to sur-

vey, Congress by no means declared that the State's title should attach from that date, and, as we have seen, until the title does vest the land is within the disposing power of the United States.

To say that the State's title attaches upon the running of the lines upon the ground is to say that the deputy surveyor's work is not subject to correction, because if upon the running of the lines the title to the land thus marked out immediately vests in the State it would be beyond the power of the surveyor general or the commissioner to make any change or correction in the survey whereby the lines of the land so marked on the ground would be altered in any respect. This is obviously unsound. Surveys are frequently changed. Even the deputy who first runs the lines often makes more than one attempt before he finally locates a line to his own satisfaction.

Thus the survey can not be said to be complete in any sense until it has been accepted by that officer to whom it must ultimately go for review and approval. The adoption of any other rule would introduce serious uncertainties and difficulties into the administration of the land laws.

The change effected by the commissioner's order of April 17, 1879, was not a change of the law, but was merely a change in the manner of making, approving, and accepting surveys. This the commissioner obviously had the power to do, and if good administration required it, the exercise of the

power became a duty. The law remained the same; the State's title attached upon completion of the survey, which could be accomplished only in the manner prescribed by the commissioner.

On page 33 of appellees' brief it is intimated that the approval of this survey was withheld to the end that officers of the Government might be afforded an opportunity to examine the lands and determine whether the school sections should be withdrawn and the State's title thus defeated. Not only does the record contain nothing to justify this insinuation, but, on the contrary, it clearly shows that such was not the case. The survey was not accepted for the reason that the deputies' return failed to show compliance with the regulations; and when it was accepted for payment only on January 31, 1906, it was further suspended as a survey upon which entries and claims could be based until certain charges of fraud could be investigated (R. 25).

Appellees attach much importance to the fact that when the lands were withdrawn by the land department and included in the reservation by the President they were described by reference to the rectangular system of surveys. The correspondence relating to the withdrawal of the lands, while included in the agreed statement, does not form a part of the record. However, we have procured certified copies and filed them with the clerk.

This correspondence shows that the lands were withdrawn upon the recommendation of the Secre-

tary of Agriculture, who appended to his letter a diagram of the lands involved. True, this diagram indicated the lands by townships and fractional townships, but neither the diagram nor the letter accompanying it contained anything to show that a survey of the lands had been made and accepted; nor is any mention made in the orders of section 16 or any other sections in this township. The officers making the withdrawal described the lands as certain townships, thus using the best means of identification available, and when upon a final approval of the survey it was found to embrace the particular section involved the withdrawal necessarily operated thereon and precluded vesting of the State's title.

Finally, appellees contend that the school sections in the withdrawn area were excluded from the forest reservation by the very terms of the President's proclamation of January 25, 1907 (34 Stat. 3270), which excepted from its operation all lands embraced in any withdrawal or reservation for any use or purpose with which the reservation for forest purposes was inconsistent. We submit that this argument but begs the question. If, as we contend, the State's right did not attach prior to the filing of the plat in the local land office pursuant to the Commissioner's order, the lands were withdrawn from the operation of the general land laws by the Secretary's order of December 16, 1905, and were not, therefore, lands reserved for the State.

Moreover, the exception in the President's proclamation, upon which appellees rely, clearly had reference to reservations and withdrawals made by the Executive for governmental purposes. If the State's right had attached to the school sections, they would have been beyond the reach of the President's power, and it would have been wholly unnecessary for him to except them in terms from the operation of his proclamation.

CONCLUSION.

The decree of the circuit court of appeals should be reversed and the decree of the district court affirmed.

Respectfully submitted.

ERNEST KNAEBEL,
Assistant Attorney General.
S. W. WILLIAMS,
Attorney in the Department of Justice.

On the meaning of "public lands" in the Forest Reserve act of 1891, see 28 Op. Atty. Gen. 587, 591 et seq.

APPENDIX.

DEPARTMENT OF THE INTERIOR.
Washington, December 1, 1915.

DEAR MR. ATTORNEY GENERAL: In compliance with your informal request of recent date I have the honor to advise you that the records of the General Land Office show that selections of lands, as school-land indemnity, in lieu of 630.11 acres of sec. 36, T. 3 S., R. 6 E., W. M., containing 640.80 acres, have been made by the State of Oregon, and that such selections have been approved and certified to the State as follows:

NW. ¼ sec. 26, T. 24 S., R. 2 W., W. ½ SE. ¼ and SE. ¼ SE. ¼ sec. 2, T. 38 S., R. 6 W., and lot 2, sec. 24, T. 36 S., R. 1 W., Roseburg land district, selected January 10, 1910, in lieu of NW. ¼, N. ½ NE. ¼, SW. ¼ NE. ¼, and 28.96 acres of lot 3. Selections approved January 25, 1913, and certified to the to the State January 30, 1913, in approved list No. 30.

Lot 5 sec. 19, lot 1 sec. 20, and lots 1, 2, and 3, sec. 30, T. 25 S., R. 28 E., W. M., Burns land district, selected January 10, 1910, in lieu of NE. ¼ SE. ¼, 39.25 acres of lot 2 and 40.05 acres of lot 4. Selections approved August 6, 1912, and certified to the State August 17, 1912, in approved list No. 16.

NE. ¼ NW. ¼ and NW. ¼ NE. ¼ sec. 34, T. 26 S., R. 39 E., Vale land district, selected January 12, 1910, in lieu of N. ½ SW. ¼. Selections approved August 6, 1912, and certified to the State August 15, 1912, in approved list No. 2.

Lot 2 sec. 3, T. 30 S., R. 17 E., Lakeview land district, selected March 4, 1910, in lieu of 40.35 acres of lot 1 and 1.50 acres of lot 3. Selection approved January 8, 1913, and certified to the State February 12, 1913, in approved list No. 22.

SE. ¼ NE. ¼ and NE. ¼ SE. ¼ sec. 30, T. 7 S., R. 15 E., W. M., The Dalles land district, selected January 8, 1910, in lieu of NW. ¼ SE. ¼ and SE. ¼ NE. ¼. Selections approved May 31, 1913, and certified to the State June 12, 1913, in approved list No. 26.

The record also shows that the State was allowed, by letter G of the General Land Office, dated September 3, 1908, to substitute in approved list No. 7, The Dalles series, of indemnity school-land selections, the N. ½ NE. ¼ of sec. 16, T. 3 S., R. 6 E., in place of the lands designated therein as base for the selection of E. ½ SE. ¼, sec. 26, T. 17 S., R. 10 E., W. M. It does not appear that the State has ever used any other part of said section 16 as base for indemnity selection.

Cordially, yours,

ANDRIEUS A. JONES,
First Assistant Secretary.

The honorable the ATTORNEY GENERAL.

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UNITED STATES OF AMERICA.

THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,
Appellant,
vs.
W. J. MORRISON, FINLEY MORRISON and THE SLIGH FURNITURE COMPANY, a Corporation,
Appellees.

No. 24,193.
Docket No. 138—
October Term, 1915.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLEE SLIGH FURNITURE COMPANY.

MARK NORRIS and
OSCAR E. WAER,
of Counsel for Appellee,
Sligh Furniture Company.

THE ONDERDONK PRINTING CO., GRAND RAPIDS, MICH.

UNITED STATES OF AMERICA.

THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, *Appellant,* vs. W. J. MORRISON, FINLEY MORRISON and THE SLIGH FURNITURE COMPANY, a Corporation, *Appellees.*	No. 24,193. Docket No. 138— October Term, 1915.

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INDEX.

TABLE OF CASES CITED.

PROPOSITIONS OF LAW WITH CITATIONS.

UNITED STATES OF AMERICA.

THE SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLEE SLIGH FURNITURE COMPANY.

At the time this brief is being sent to the printer, we have not been served with copies of the Brief for the Appellant. We therefore include in this Brief a statement of facts, as we shall have no opportunity to correct the statement of facts in appellant's brief, if one is finally prepared.

I.

Statement of Facts.

This case involves title to lands in section sixteen, township three south, range six east, Willamette Meridian, Oregon.

Appellees claim title through conveyance from the State of Oregon, and contend that Oregon derived its title under the "School" land grant made by the United States.

Appellant claims the title never passed to Oregon because of the withdrawal of said lands by executive order, and their inclusion by such order in the Cascade Forest Reserve.

The facts in chronological order are as follows: (Italics, unless otherwise stated, are ours.)

October 14, 1848.

Act of Congress establishing the territorial government of Oregon, which provided in section 20 thereof as follows:

"Sec. 20. And be it further enacted, that when the lands in the said Territory shall be surveyed under the direction of the government of the United States, *preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same is hereby, reserved for the purpose of being applied to schools* in said Territory, and in the States and Territories hereafter to be erected out of the same. (9 Stats. 330.)

September 27, 1850.

Congress passed act creating the office of surveyor general of Oregon, and to provide for survey and for donations to settlers. Section 9 of this act provided as follows:

"No claim to a donation right under the provisions of this act upon sections 16 or 36 shall be valid or allowed, if the residence and cultivation upon which the same is founded shall have commenced after the survey of the same." (9 Stats. 496.)

February 19, 1851.

Congress passed an Act which was entitled and which provided in part as follows:

"An Act to authorize the Legislative Assmblies of the Territories of Oregon and Minnesota to take Charge of the School Lands in said Territories, and for other Purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the governors and legislative assemblies of the Territories of Oregon and Minnesota be, and they are hereby, authorized to make such laws and needful regulations as they shall deem most expedient *to protect from injury and waste sections numbered sixteen and thirty-six in said Territories, reserved in each township for the support of schools therein.*" (9 Stats. 568.)

January 7, 1853.

Congress authorized the legislative assembly of the Territory of Oregon to select other lands.

"In all cases where the *sixteen or thirty-six sections*, or any part thereof, shall be taken and occupied under the law making donations of land to actual settlers or otherwise." (10 Stats. 150.)

February 14, 1859.

Enabling Act admitting Oregon as a State. Section 4 of the Enabling Act provided in part as follows:

"That the following propositions be and the same are hereby offered to the said people of Oregon for their free acceptance or rejection; which, *if accepted, shall be obligatory upon the United States and upon the state of Oregon,* to-wit: *First. That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted* to said state for the use of schools. * * * Provided, however, that in case any of the lands *herein granted* to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act." (11 Stats. 383.)

June 3, 1859.

State of Oregon accepted provisions of Enabling Act by act of legislative assembly. This act, so far as material to this controversy, is as follows:

"Whereas, the congress of the United States did pass an act, entitled 'An act for the admission of Oregon into the Union,' approved the fourteenth day of February, one thousand eight hundred and fifty-nine; which said act contains the following propositions for the free acceptance or rejection of the people of the state of Oregon, in the words following: '§ 4. The following propositions be and the same are hereby offered to the said people of Oregon, for their free acceptance or rejection, which, *if accepted, shall be obligatory on the United States and upon the said state of Oregon,* to-wit: *First.* That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold, or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools.

* * * * * * * * *

"*Sixth.* And that the said state shall never tax the lands or the property of the United States in said state, *provided, however,* that in case any of the lands *herein granted* to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purpose specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act;' therefore—

§ 1. Propositions of Congress Accepted.

"That the six propositions offered to the people of Oregon in the above recited portion of the act of congress aforesaid be, and each and all of them are hereby, accepted; and for the purpose of complying with each and all of said propositions hereinbefore recited, the following ordinance is declared to be irrevocable without the consent of the United States, to-wit:

"*Be it ordained by the legislative assembly of the state of Oregon,* that the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find necessary for securing the title in said soil to the *bona fide* purchasers thereof; and that in no case shall nonresident proprietors be taxed higher than residents; and that the said state

shall never tax the lands or property of the United States within said state." (1 Lord's Oregon Laws, pages 28, 29. The whole of this Act is printed in an appendix to this brief.)

June 2, 1902.

Field survey of lands in question made. According to this survey the lands were and are described as section sixteen, town three south, range six east of the Willamette Meridian. (Record p. 19, Article III of Stipulation.)

June 2, 1903.

Field survey approved by Surveyor General of Oregon. (Record p. 19, Article III of Stipulation.)

June 8, 1903.

Surveyor General of Oregon transmitted copies of plat of survey and field notes to Commissioner of General Land Office at Washington. (Record p. 19, Article III of Stipulation.)

October 13, 1904.

General Land Office requires from Deputy Surveyors a supplemental report, showing the kind of instrument used in making the survey, and whether polaris and solar observations had been taken during the survey in the field, as required by Manual of Surveying Instructions. (Record p. 23, Exhibit 1.)

September 8, 1905.

Supplemental report showing the omitted observations, etc., sent to General Land Office. (Record p. 24.)

November 28, 1905.

Secretary of Agriculture requests Secretary of the Interior immediately to withdraw certain lands (shown on diagram attached to request) for proposed addition to Cascade Range and Bull Run Forest Reserves, Oregon. (Government's Exhibit A, not printed in record but returned for inspection; Record p. 57.)

December 6, 1905.

Request for withdrawal referred by Secretary of Interior to Commissioner of General Land Office for report and recommendation. (Government's Exhibit A, not printed in record but returned for inspection; Record p. 57.)

December 12, 1905.

Report of Commissioner of General Land Office to Secretary of Interior, in which he says: "There appears to be no reason why the *vacant unappropriated public lands* in said areas should not be temporarily withdrawn as requested." The report describes the areas to be withdrawn "*by section, town and range*", and includes "*all township three south, range six east*". (Government's Exhibit A, not printed in record, but returned for inspection; Record pp. 56, 57.)

December 16, 1905.

Secretary of Interior, by letter to Commissioner of General Land Office, temporarily withdraws from all forms of disposition whatever, except under the mineral laws, "*the vacant unappropriated public lands in the areas indicated on the diagram,* which areas are specifically described in your letter". (Government's Exhibit A, not printed in record but returned for inspection; Record pp. 56, 57.)

December 19, 1905.

Commissioner advises local Land Office by telegram of withdrawal of "*all vacant unappropriated public land* in section thirteen, township two, range six; *all township three, range six,* etc. * * * all south and east, for forestry purposes". (Government's Exhibit A, not printed in record, but returned for inspection; Record pp. 56, 57.)

December 19, 1905.

Letter to same effect confirming telegram. Letter gives description of lands by section, town and range and withdraws all the "*vacant unappropriated public lands*" in areas described. (Government's Ex-

hibit A, not printed in record but returned for inspection; Record pp. 56, 57.)

January 31, 1906.

Survey sent to Washington on June 8, 1903, formally accepted and approved by General Land Office, and its filing in local Land Office authorized. This approval was of the survey as originally turned in by the Surveyor General in 1903, and without any modification whatsoever. (Record page 19, Clause III of Stipulation, and Record page 24, letter of January 31, 1906.)

February 6, 1906.

Surveyor General of Oregon authorizes Register and Receiver of Local Land Office to file plat of survey, but directs that no *entries* of any lands be allowed until further permission was given, for the reason that there were sundry alleged illegal settlements within the limits of the survey. (Record page 25, Letter February 6, 1906.)

February 7, 1906.

Plat received in Local Land Office at Portland. (Record p. 27, Defendant's Exhibit 2.)

October 10, 1906.

State of Oregon issued certificate of sale of lands claimed by Appellees. (Record p. 20, Article VI of Stipulation.)

January 9, 1907.

State of Oregon deeded the lands to the grantors of appellees. (Record p. 20, VI.)

January 25, 1907.

Presidential proclamation enlarging Cascade Range Forest Reserve by including within it the township in question and other lands. This proclamation had attached to it a diagram, showing the reserve as enlarged by the inclusion of the additional lands. This diagram, as stated on its face, was compiled from plats on file in the General Land Office, and shows the lands in question to have been surveyed.

(Government's Exhibit B, not printed in record but returned for inspection; Record pp. 56, 57.)

This proclamation contained the following exception:

"Excepting from the force and effect of this proclamation all lands which are at this date embraced in any legal entry or covered by any lawful filing or selection duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law and the statutory period within which to make entry or filing of record has not expired; and also excepting all lands which at this date are embraced within *any withdrawal or reservation for any use or purpose to which this reservation for forest uses is inconsistent;* * * *

January 26, 1907.

Oregon's deed of these lands recorded.

November 16, 1907.

Alleged irregular entries in this township having been investigated, the suspension of entries directed by the Commissioner's letter of January 30, 1906, was removed by Commissioner. (Record pp. 25, 26.)

November 23, 1907.

Surveyor General of Oregon communicates this advice to Register and Receiver of Local Land Office. (Record p. 26.)

January 8, 1908.

Plat officially opened for actual settlers. (Record p. 27, Defendant's Exhibit 2.)

July 12, 1910.

Appellees Morrisons' deed to Appellee Sligh Furniture Co. (Record p. 21, Article VII of Stipulation.)

II.

It is the contention of Appellees,

A. By Oregon's acceptance of the provisions of the Enabling Act of February 14, 1859 (11 Stats. 383), on June 3, 1859 (1 Lord's Oregon Laws, 28, 29), Oregon acquired a present vested right to all school sections as a float subject only to identification by survey, upon which identification the grant vested in the specific lands in question.

B. If the grant was not a grant *in praesenti*, title vested in the State when the field survey was made on June 2, 1902, or

C. If not then, upon the approval of the field survey by theSurveyor General of Oregon June 2, 1903.

D. If it could be claimed that the grant did not vest until the survey was approved by the General Land Office, the designation of the lands in question by the Commissioner of the General Land Office, by the Secretary of Agriculture and by the Secretary of the Interior, according to the survey which had been made (*which survey was later approved as made*) constituted such approval.

E. Immediately upon the formal approval of the field survey by the Land Office on January 31, 1906, the statutory reservation and grant (contained in 9 Stats. 323; 11 Stats. 383), destroyed the effect of the temporary withdrawal, if such withdrawal ever had any effect and vested the title to these specific lands in the State of Oregon.

F. When the survey was formally approved on January 30, 1906, the lands in question had not been "*sold or otherwise disposed of*" within the meaning of the Enabling Act of February 14, 1859 (11 Stats. 383), and title therefore vested absolutely in the State of Oregon on that date, if not before.

G. The alleged executive withdrawal of these lands, made December 16, 1905, was of no force because,

(a) If the lands were then "public" lands, i. e., surveyed, the school grant had vested in the specific lands and the executive department had no authority in the premises.

(b) If the lands were then not "public" lands, i. e., unsurveyed, there was no executive power to withdraw or reserve them for forest purposes.

H. The presidential proclamation of January 25, 1907, was of no force because,

(a) At that time the grant was vested in the State of Oregon as to these specific lands, and

(b) The proclamation expressly excepts the lands in question from its operation.

III.

ARGUMENT.

A.

The Grant was a Grant in Praesenti.

By Oregon's accepance on June 3, 1859, of the provisions of the Enabling Act of February 14, 1859, the state acquired a present vested right to all school sections as a float, subject only to identification by survey.

Ham vs. Missouri, 18 How. 126.
Beecher v. Wetherby, 95 U. S. 517.

The first decision of this Court construing substantially the same language found in the Oregon School grant is, 1855, *Ham v. Missouri*, 18 How. 126. The significance of this case justifies its examination.

By the Act of March 6, 1820 (3 Stats. 545), entitled.

"An Act to authorize the People of the Missouri Territory to form a constitution and state government, and for the admission of such state into the union upon an equal footing with the original states, and to prohibit slavery in certain territories", it was provided in section 6:

> "That the following propositions be and the same are hereby, offered to the convention of the said Territory of Missouri when formed, for their free acceptance or rejection, which, if accepted by the convention shall be obligatory upon the United States:
>
> "First: That section numbered sixteen in every township, and when such section has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to the state for the inhabitants of such township for the use of schools."

The people of Missouri by convention July 19, 1820, accepted the foregoing grant.

The case cited arose thus: Ham, the plaintiff in error, was indicted by the state for having committed waste on the sixteenth section of a certain township in Missouri, and, upon conviction, he appealed to the Supreme Court of Missouri, which affirmed the judgment, whereupon he appealed to this court.

Ham claimed title to the lands in section 16, upon which the waste had been committed, under an inchoate Spanish grant, claimed to have been confirmed by an Act of Congress approved May 24, 1828, 6 Stats. p. 386. The State of Missouri claimed title to the same lands under the school grant above quoted. Upon trial in the court below the parties having placed their respective titles in evidence, the court instructed the jury "That the Act of the 6th of March, 1820, entitled 'An Act to authorize the people of Missouri territory to form a constitution and state government, etc., taken in connection with an

ordinance declaring the assent thereto by the people of Missouri, by their representatives assembled in convention on the 19th of July, 1820, *operated as a grant by Congress to the State of Missouri for the use of schools of the 16th section in controversy, unless such sixteenth section had been previously disposed of by the government;* that, although the land claimed by the proprietors of Mine LaMotte was by several acts of congress reserved from sale, and that the survey of said claim includes the 16th section in controversy, any such reservation is not such disposition of said section by the government as is within the saving clause of the sixth section of the Act of 1820, and cannot operate to prevent the title from vesting in the state by virtue of said grant." (p. 130.)

This Court said:

> "Upon the accuracy or inaccuracy of the instructions given by the court at the instance of the state * * * * the decision of this cause must depend.
>
> "It would seem not to admit of rational doubt that the Act of Congress of March 6, 1820, authorizing the people of the Territory of Missouri to form a constitution and state government, taken in connection with the ordinance of the state convention of the 19th of July, 1820, amounted to not merely a grant for the use of schools of the sixteenth section of every township of public lands in the territory, but further to a positive condition or mandate, so far as Congress possessed the power to impose it, for the dedication of those sections to that object. The assertion of the court then of the existence and character of such grant, whilst it recognized any proper limitation or qualification passed thereon either by previous Acts of Congress or by investiture of any rights arising therefrom, can be obnoxious to no just criticism, but was in all respects proper."

The attention of the Court is called to the fact that the Oregon School grant is to all intents and purposes iden-

tical with the Missouri School grant touching which this court has used the emphatic language quoted.

On page 133, this court, commenting further upon the Missouri school grant, said:

> "The language and plain import of the sixth section of the act of March 6, 1820, confer a clear and positive and unconditional donation of the Sixteenth section in every township; and when these have been sold or otherwise disposed of, other and equivalent lands are granted."

Beecher v. Witherby, 95 U. S. 517.

In this case, this Court construed the grant in the Enabling Act admitting Wisconsin. The grant to Wisconsin, while not showing the intent of Congress to convey a present interest as clearly and conclusively as does the Oregon Act, was held to be a grant *in praesenti*, and to convey a present interest.

The Wisconsin Enabling Act provided that:

> "The following propositions are hereby submitted to the convention which shall assemble for the purpose of forming a constitution for the State of Wisconsin, for acceptance or rejection; and *if accepted* by said convention, and ratified by an article in said constitution, *they shall be obligatory on the United States:*
>
> "1. That section numbered sixteen in every township of the public lands in said state, and when such section has been sold or otherwise disposed of, other land equivalent thereto, and as contiguous as may be, *shall be granted* to said state for the use of schools."

The Oregon Enabling Act contains a similar provision, as follows:

> "That the following propositions be and the same are hereby offered to the said people of Oregon for their free acceptance or rejection, which, *if accepted, shall be obligatory upon the United States and upon the State of Oregon*, to-wit: *First*, that

> sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, *shall be granted* to said state for the use of schools."

The Oregon act, however, contains an additional clause, which is very significant:

> "Sixth. And that the said state shall never tax the lands or the property of the United States in said state; *provided, however,* that in case any of the *lands herein granted* to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act."

Upon its face the evident intent of this grant is that it shall take effect upon acceptance by Oregon. That being done, the lands are spoken of in the act itself as "the lands herein granted", which are certainly words of present grant. These words are found neither in the Minnesota or Wisconsin school grant acts, and to that extent the Oregon School grant affords stronger grounds for holding it a present grant than either the Wisconsin or Minnesota grants.

In *Beecher v. Wetherby* this Court held that the grant thus made to the state of Wisconsin was a grant which could not be defeated by a subsequent disposition of the lands by the United States; that with the identification by survey of the sections granted, the title of the state became complete "unless there had been a sale or other disposition of the property by the United States *previous to the compact with the state*". (p. 524-25.) This Court said in part:

> "It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the

public lands in the state, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. *In either case, the lands which might be embraced, within those sections were appropriated to the State.. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted.* All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. *They could not be diverted from their appropriation to the State.*

"In *Cooper v. Roberts*, 18 How. 173, this court gave construction to a similar clause in the compact upon which the State of Michigan was admitted into the Union, and held, after full consideration, that by it the State acquired such an interest in every section 16 that her title became perfect so soon as the section in any township was designated by the survey. 'We agree,' said the court, 'that, until the survey of the township and the designation of the specific section, the right of the state rests in compact, —binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But, when the political authorities have performed this duty, the compact has an object upon which it can attach, and, if there is no legal impediment, the title of the State becomes a legal title. The *jus ad rem*, by the performance of that executive act, becomes

> a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others.' In this case, the township embracing the land in question was surveyed in October, 1852, and was sub-divided into sections in May and June, 1854. With this identification of the section, the title of the State, upon the authority cited, became complete, unless there had been a sale or other disposition of the property by the United States *previous to the compact with the State.. No subsequent sale or other disposition*, as already stated, could defeat the appropriation."
>
> * * * * * * * * *
>
> "The Act of Congress of Feb. 6, 1871, authorizing a sale of the townships occupied by the Stockbridge and Munsee tribes, must, therefore, be held to apply only to those portions which were outside of section 16. It will not be supposed that Congress intended to authorize a sale of land which it had previously disposed of. *The appropriation of the sections to the State, as already stated, set them apart from the mass of public property which could be subjected to sale by its direction.*"

This case has never been reversed or modified. It was cited with approval in the case of *United States v. Thomas*, 151 U. S. 577, 583, and this Court, in the following language, re-affirmed the rule which had been laid down:

> "In *Beecher v. Wetherby*, 95 U. S. 517, 525, this court had occasion to consider the nature of the right which Wisconsin took to the sixteenth section in the townships of that State by virtue of her enabling act, which declared that it was an unalterable condition of her admission into the Union that section sixteen of every township of the public lands of the State which had not been sold or otherwise disposed of, should be granted to her for the use of schools. The court said that this compact, whether considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating as a transfer of the

> title to the State, upon her acceptance of the proposition, as soon as the sections could be afterwards identified by the public surveys—in either case the lands which might be embraced within those sections were appropriated to the State, subject to any existing claim or right to them."

1913. Alabama v. Schmidt, 232 U. S. 168.

The school grant to Alabama was in the following language:

First: That the section numbered sixteen in every township, and when such section has been sold, granted or disposed of, other lands equivalent thereto and most contiguous to the same shall be granted to the inhabitants of such townships for the use of schools.

The appellee Schmidt was sued by the State of Alabama to recover possession of part of section sixteen, alleged school lands, given to the state by the act above quoted. The defendant had pleaded the statute of limitations of Alabama, and recovered judgment, which was affirmed by the Supreme Court of the state. The basis of this opinion was that the State of Alabama had title to the land under the school grant. This Court said:

> "The above mentioned Act of Congress, under which Alabama became a state, provided that section sixteen in every township shall be granted to the inhabitants of such township for the use of schools. Of course the state must have meant as it expressly agreed, that these words vested the legal title in them, since it relies upon them for recovery in the present case. Any other interpretation would hardly be reasonable. In some cases the grant has been to the state in terms, but in which ever way expressed probably it means the same, so far as the legal title is concerned."

On page 173, discussing the duties of the state as to the school lands, this Court further says:

> "The gift to the state is absolute, although no doubt, as said in *Cooper v. Roberts*, 18 How. 173,

> 182, there is a sacred obligation imposed on its public faith."

1905.. U. S. v. Tully, 140 Fed. 904, 905.

The Montana School Act of May 26, 1874, 13 Stats. 91, was like the statute of 1848, reserving the Oregon school land. In this case, which was a criminal case in which the jurisdiction of the court depended on whether or not the lands were within the military reserve or not, the District Judge held that they were not within the reserve, and incidentally remarks:

> "After the passage of the organic act, Sections 16 and 36 in the territory of Montana ceased to be public lands, and they were withdrawn from sale or other disposal under general laws."

The cases of *Heydenfeldt v. Daney,* 93 U. S. 634, *Minnesota v. Hitchcock,* 185 U. S. 373, and *Wisconsin v. Hitchcock,* 201 U. S. 202, are cited by counsel for the United States as sustaining the contrary doctrine. An examination of these cases will show, that the rule of *Beecher v Wetherby* has never been changed or modified.

The case of *Heydenfeldt v. Daney,* 93 U. S. 634, involved the grant of school lands to the State of Nevada. It was decided in October, 1876, a year before *Beecher v. Wetherby,* and while cited by counsel in the Beecher case, was not referred to by the court in its opinion. So far as it lays down any rule contrary to the Beecher case, it must be considered as having been overruled by that case.

The court in *Heydenfeldt v. Daney* held the grant to Nevada not to be a grant *in praesenti* though words of present grant were used, and based its decision upon the fact that the Nevada enabling act contained the words "where such sections have been sold or otherwise disposed of *by any act of Congress*" and that inasmuch as,

at the time of the passage of the Nevada act, Congress had never undertaken to provide "any disposition of the national domain within that Territory" (p. 638) the words of exception above quoted must, to be given any effect at all, be construed to relate to the future; that Congress had so construed it and that Nevada had accepted that construction: hence the court held that by the act itself Congress had the right by the mineral laws to make disposition of the school lands at any time prior to the survey thereof. The defendant who claimed under the mineral laws had initiated its right prior to any survey.

The case at bar differs from *Heydenfeldt v. Daney* in this

1. The words of the Oregon act are, "where such sections have been sold or otherwise disposed of"—the words of the Nevada act "by any act of Congress" are not found.

2. Prior to the Oregon grant Congress had passed several laws providing for the disposition of the national domain within that state

Act Aug. 14, 1848, 9 Stat. 323.
Act Sept. 27, 1850, 9 Stat. 496.
Act Feb. 14, 1853, 10 Stat. 158.
Act July 17, 1854, 10 Stat 305.
Act May 29, 1858, 11 Stat. 293.

3. In the Heydenfeldt case the defendant claimed title under a United States mining claim patent; i. e. the U. S. had sold or disposed of the land to a third party who had acquired it pursuant to U. S. statute.

While here the United States is seeking to retain for itself, what it had by act of Congress promised, and as we claim conveyed, to the State of Oregon.

The case of *Minnesota v. Hitchcock*, 185 U. S. 373, 400,

expressly recognizes and by quotations reaffirms with approval the rule laid down in *Beecher v. Wetherby*, and cannot be considered as changing or modifying that case. All that the case holds is that the title of the State had never attached to the lands involved, for the reason that such lands had never become public lands, having been occupied by the Indians, and had therefore not passed under the grant contained in the enabling act.

The case of *Wisconsin v. Hitchcock*, 201 U. S. 202, was held to be controlled by the earlier case of *United States v. Thomas*, 151 U. S. 577, in which the doctrine of the Beecher case had been expressly recognized and reaffirmed, and does not in any way infringe upon the rule of the Beecher case.

It would seem clear from an examination of the foregoing cases that the case of *Beecher v. Wetherby* has never been reversed or modified and that it is now the law. Under the decision of that case, the words of grant in the enabling act conveyed an interest *in praesenti*, and the State of Oregon could not by subsequent Congressional or executive action be deprived of any of the lands thus conveyed.

Even if it could be claimed that the case of *Beecher v. Wetherby* has been modified or even overruled by subsequent cases, the grant involved in this case would still have to be held a grant *in praesenti*.. There is in this case a clearer intent shown on the part of Congress to convey an interest *in praesenti* than was shown in the Wisconsin grant.

The language of the Wisconsin and Minnesota grants construed in *Beecher v. Wetherby* and *Minnesota v. Hitchcock* is identical with the language of the Oregon grant as far as the same provides in clause 1 that there "shall be granted to the state for the use of schools" certain sections of land in each township. The Oregon

land grant goes farther, however, in showing that Congress intended to convey an interest *in praesenti*. After making a grant of sections 16 and 36 and other lands for school purposes, the enabling act says:

> "Provided, however, that in case any of the lands *herein granted* to the State of Oregon have heretofore been confirmed to the Territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act."

The use of the words "herein granted" would seem to show conclusively that Congress intended and supposed it had made a grant *in praesenti* and not one *in futuro*.

The enabling act itself provided that upon acceptance of the proposition therein set forth by the people of Oregon, the same should become "obligatory on the United States and upon the said State of Oregon." The people of Oregon did accept the propositions which Congress stated covered lands "*herein granted*," and in the Act of acceptance the very language used by Congress in its propositions and in the proviso speaking of the lands as "herein granted" was recited.

It would seem too clear for argument that by the use of the phrase "*lands herein granted*," both Congress and the State of Oregon understood that a grant *in praesenti* had been made which was obligatory upon both.

Other acts of Congress show that the title of the State of Oregon to these lands was recognized and respected.

Legislation by Congress with reference to the Territory of Oregon *prior* to the passage of the enabling act shows a clear intent to reserve to the Territory and to the State sections 16 and 36 for school purposes, and congressional action *after* the acceptance of the enabling act

shows a recognition of the paramount title of the state in these lands.

The act establishing the territorial government (Act Aug. 14, 1848, 9 Stat. 323) provides:

> "That when the lands in the said Territory shall be surveyed under the direction of the government of the United States, *preparatory to bringing the same into market*, sections numbered sixteen and thirty-six in each township in said Territory *shall be, and the same is hereby, reserved* for the purpose of being applied to schools in said Territory, and in the State and Territories hereafter to be erected out of the same."

The intent of Congress absolutely to reserve sections 16 and 36 to the State was shown in the Act of February 19, 1851, 9 Stat. 568, authorizing the Territories of Oregon and Minnesota

> "to make such laws and needful regulations as they shall deem most expedient to protect from injury and waste sections numbered sixteen and thirty-six in said Territories, reserved in each township for the support of schools therein."

This intent was again recognized by the passage of Act of January 7, 1853, 10 Stat. 150, authorizing the Legislative Assembly of the Territory of Oregon to select other lands

> "in all cases where the sixteen or thirty-six sections, or any part thereof, shall be taken and occupied under the law making donations of land to actual settlers or otherwise."

In the court below, counsel for the United States argued that if the claim that the grant was a grant *in praesenti* were well founded, then Congress could have given no rights to settlers in any of these lands; and that Congress, by giving such rights through various donation acts passed after the enabling act, showed its intention to retain the power of disposal of unsurveyed

school lands prior to survey. The fallacy of this contention lies in the fact that rights given by the donation acts were conferred by acts antedating the enabling act, and such rights were *not* enlarged by subsequent acts.

The donation act of September 27, 1850 (9 Stat. 496), authorized settlement upon lands in Oregon, but provided that no claim on the school sections should be allowed when settlement had commenced *after the survey of the same.*. (Sec. 9.)

This act was later modified by the General Indemnity Act, so that settlements were allowed only when commenced *before survey of the land in the field.* (Act of Feby. 26, 1859, 11 Stats. 385, or Revised Stats. 2275; Act Feby. 28, 1891, 26 Stat. 796.)

The enabling act granting these lands to the State of Oregon was passed in 1859, while the Oregon Settlement or Donation Act was passed in 1850, so that the State of Oregon took title to sections 16 and 36 subject to rights which had been or which might be obtained under the donation act. The enabling act itself excepted claims of settlers by the clause—

> "Where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of schools."

By the passage of the Oregon settlement or donation act, Congress gave to future settlers certain rights in public lands in the territory and future state of Oregon. The settlement or donation act was passed prior to the enabling act, and the enabling act expressly excepted from the operation of the grant lands already disposed of under the land laws applicable, and this was the only exception to the absolute grant made to the state. There was no right reserved to the United States to make any

other and different disposition of these lands, and no other or different disposition could be made of them. They belonged to the State of Oregon subject to rights previously lawfully obtained.

Under the prior decisions of this court, and under the peculiar language used by Congress, the grant to the State of Oregon of sections sixteen and thirty-six was clearly a grant *in praesenti* which vested title in the state as a float immediately on acceptance of the grant.

St. Paul v. Northern Pacific, 139 U. S. 5.
United States v. Oregon & Calif. R. R., 176 U. S. 28.
Butz v. Northern Pacific, 119 U. S. 55.
Southern Pacific v. United States, 168 U. S. 1.
United States v. Southern Pacific, 146 U. S. 570.
Menotti v. Dillon, 167 U. S. 703.
Missouri, Kansas & Texas v. Cook, 163 U. S. 191.
N. Y. Indians v. United States, 170 U. S. 1.

The title became perfect when the lands were identified and had relation back to the date of the grant, so that any sale or disposal subsequent to the date of the granting act and its acceptance was illegal and void.

Wright v. Roseberry, 121 U. S. 488, 501.
Tubbs v. Wilhoit, 138 U. S. 134, 136.
Rogers Locomotive Works v. Emigrant Co., 164 U. S. 559, 570.
Chandler v. Mining Co., 149 U. S. 79, 91.
French v. Fyan, 93 U. S. 169.
Martin v. Marks, 97 U. S. 345.
Railroad Co. v. Smith, 9 Wall. 95.
Rice v. Sioux City, etc., Ry. Co., 110 U. S. 695.
Mich. Land Co. v. Rust, 168 U. S. 589, 591.

B.

If the Grant was not In Praesenti, Title Vested When the Field Survey was made.

The field survey of the lands in question was completed June 2, 1902 (Record page 19, Article III of Stipulation.) Upon that date the lands were identified as part of section sixteen, and they passed to the State of Oregon under the grant theretofore made.

Cooper v. Roberts, 18 Howard 173.

The question was merely one of identification, and this identification was complete when the field survey was made. This is particularly true in view of the fact that the field survey was later approved by the Commissioner of the General Land Office *unaltered*.. (Record page 19, Article III of Stipulation.) This fact alone, under the familiar doctrine of relation, seems conclusive on this point. The approval of the field survey by the Commissioner of the General Land Office on January 31, 1906, related back to the date of the survey on June 2, 1902, and confirmed the State's title to these specific lands as of that date.

The question at most is one of identification. The identification was as complete as it ever could be upon the making of the field survey. The exact location of the land was then fixed. It was never subsequently changed.

Also the statutes of the United States would seem to intend just that identification.

The Oregon School Reservation Act of October 14, 1848 (9 Stat. 330), contains words of present reservation, not when the field survey is approved or filed in the local land office but "when the lands * * * shall be surveyed * * * *preparatory* to bringing the same into the market". The use of the word "preparatory" is

significant and points out the intention of Congress that the reservation should be effectual not when the lands were actually opened to public entry but before, i. e. that the reservation should be complete while a market was being prepared for, not after it had been fully prepared.

The same intent is indicated by the general identity Act.

Act Feby. 26, 1859, 11 Stat. 385.

R. S. § 2275.

Act Feby. 28, 1891, 26 Stat. 796.

This act gave settlements priority against the school grant only where the settlement was initiated prior to the survey "in the field".

1997. Hibbard v. Slack, 84 Fed. 571.

In this case District Judge Welborn ruled that California's titles to school sections vested on the making of the field survey, and that thereafter such sections could not by presidential action be placed in a forest reserve and new selections made in their stead under the Act of February 28, 1891, 26 Stats. 796.

C.

If Title had not Vested upon the completion of the Field Survey, it did Vest upon its Approval by the Surveyor General of Oregon.

The field survey was completed June 2, 1902, and it was approved *unaltered* by the Surveyor General of Oregon on June 2, 1903 (Record page 19, Article III of Stipulation).

The act creating the territorial government of Oregon provided:

"That when the lands in the said Territory shall

be surveyed under the direction of the government of the United States, *preparatory to bringing the same into market*, Sections 16 and 36 in each township in said Territory shall be, and the same is hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same." (Act Aug. 14, 1848, 9 Stat. 323.)

And the Enabling Act of February 14, 1859 (11 Stats. 383), granted these lands, subject to identification by survey, to the State of Oregon.

A statute speaks, and its meaning is to be determined as of the date of its adoption. What it meant when adopted it continues to mean until it is amended or repealed. It cannot mean one thing at one time and something else at another.

In Endlich on Interpretation of Statutes (Ed. 1888, Sec. 85) it is said:

> "The language of a statute, as of every other writing, is to be construed in the sense it bore at the period when it was passed."

See also

Platt v. Union Pac., 99 U. S. 48, 63.

Smith v. Townsend, 148 U. S. 490, 494.

M. & O. v. Tennessee, 153 U. S. 486 502.

Dewey v. United States, 178 U. S. 510, 520.

In *Platt v. Union Pacific* this Court said, speaking of the construction of statutes:

> "There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. * * * But in endeavoring to ascertain what the Congress of 1862 intended we must as far as possible place ourselves in the light that congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."

At the time of the passing of the act reserving these lands for the use of schools, and also at the time of the passage of the granting act, a survey was complete for all purposes when approved by the Surveyor General of Oregon. It was not until April 17, 1879 (see Tubbs v. Wilhoit, 138 U. S. 134, and Frasher v. O'Connor, 115 U. S. 102, 104), that by a new regulation of the Land Office the approval of that office was required to complete a survey. It will hardly be contended that a regulation of the Land Office, made for the purposes of convenience and possibly to conduce to greater accuracy, could have the effect of changing the meaning of the statutes of Congress enacted twenty and thirty years previously. If this case had arisen in 1875 the court would have held that these lands were sufficiently identified when the Surveyor General of Oregon had approved the plat. The statutes under which the state of Oregon claims have not been altered since 1875. If in 1875 they had one meaning, necessarily they must have the same meaning now. No law of Congress has been, and we believe none can be, cited which authorizes a change in a statute of the United States to be made by a departmental rule.

It is well settled that the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof.

Burfenning v. Railroad Co., 163 U. S. 323.
U. S. v. George, 228 U. S. 14
Daniels v. Wagner,: 237 U. S. 547.
Smelting Co. v. Kemp, 104 U. S. 636, 646.
Wright v. Roseberry, 121 U. S. 488, 519.
Doolan v. Carr, 125 U. S. 618.
Davis, Admr. v. Weibbold, 139 U. S. 507, 529.
Knight v. U. S. Land Assn., 142 U. S. 161.

In *Burfenning v. Railroad Co.*, 163 U. S. 323, this Court said:

> "When by Act of Congress a tract of land has been department in defiance of such reservation or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

It appears that the surveys in question were approved by the Surveyor General of Oregon June 2, 1903, two years and a half before the temporary withdrawal by the Secretary of the Interior, and three years and a half before the presidential proclamation. Therefore, at the date of those alleged withdrawals, the lands were vested in the state of Oregon by virtue of the school land grant act and the approval of the Surveyor General of Oregon of the field survey on June 2, 1903

D.

The official use of the plat as filed in the General Land Office constituted an approval of it, which binds the United States.

The facts with reference to the survey of these lands, stated in chronological order, are as follows:

June 2, 1902.

Field survey made. (Record page 19, Article III of Stipulation.)

June 2, 1903.

Field survey approved *unaltered* by Surveyor General of Oregon. (Record p. 19, Article III of Stipulation.)

June 8, 1903.

Field survey transmitted to General Land office. (Record page 19, Article III of Stipulation.)

November 28, 1905.

Field survey *used* by Secretary of Agriculture, to identify these lands. (Government's Exhibit A, not printed in record, but returned for inspection.)

December 12, 1905.

Field survey used by the Commissioner of the General Land Office to identify these lands. Commissioner describes the lands by section, town and range and includes in his description "*All township three south, range six east*".. (Government's Exhibit A, not printed in record, but returned for inspection.)

December 16, 1905.

Field survey used by Secretary of Interior to identify these specific lands.. (Government's Exhibit A, not printed in record, but returned for inspection.)

December 19, 1905.

Field survey used by Commissioner of General Land Office to identify these specific lands. These specific lands described as "All township three range six—south and east". (Government's Exhibit A, not printed in record, but returned for inspection.)

January 31, 1906.

Field survey approved by Commissioner of General Land Office *unaltered.*

It will be seen from the foregoing that, while the plat of the survey was not formally approved by the Commissioner of the General Land Office until January 31, 1906, *its existence and correctness were recognized and the plat was officially used* by the Secretary of Agriculture, the Secretary of the Interior, and by the Commis-

sioner of the General Land Office prior to that time, and prior to December 16, 1905, when the Secretary of the Interior attempted to withdraw these lands. Such official use of the plat constituted an approval thereof.

> Wright v. Roseberry, 121 U. S. 488, 501.
> Tubbs v. Wilhoit, 138 U. S. 134, 144, 145.

In *Wright v. Roseberry* certain plats, furnished by the state of California, were by statute required to be approved by the General Land Office (p. 514). No formal approval of the plats appeared, but it did appear that they had been officially used. This was held to be a sufficient approval, and the court speaks of the plat (p. 517) as "approved by the commissioner as shown by its official use," and they hold that the plat was sufficient and based title upon it.

In the subsequent case of *Tubbs v. Wilhoit*, the court, alluding to the decision in Wright v. Roseberry, said (p. 144):

> "In *Wright v. Roseberry* there was no approval of the township plat in terms, but it was held to be an approved plat by the fact that ih was officially used as such."

In the Tubbs case there was a similar plat, to which the Commissioner of the General Land Office was shown to have made reference, and subsequently the United States issued a patent describing the lands according to the official plat of the survey. Having considered these facts, the court further said (p. 145):

> "It is therefore conclusively established that such township plat was recognized by the Land Department at Washington as a correct plat, and used an approved plat by the fact that it was officially in Wright v. Roseberry."

And on page 146 the court said:

> "Whether the township plat be considered as approved by the action of the surveyor general or by the subsequent recognition of its correctness by the commissioner of the General Land Office, when approved, the duty of the commissioner to certify over to the state the lands represented thereon as swamp and overflowed was purely ministerial. * * * A strange thing it would be if the refusal of an officer of the government to discharge a ministerial duty could defeat a title granted by an act of Congress, and enable him to transfer it to parties not within the contemplation of the government."

In addition to this official use of this plat, forty-three days later, January 31, 1906, the plat was formally approved by the General Land Office without alteration or amendment of any kind. By the familiar doctrine of relation, the facts should be held to identify this land as being within the school land grant as of the date of the field survey. The contention of the government that formal approval is necessary, amounts to nothing but a technicality, which should not be allowed to defeat the evident intent of the congressional grant.

That the field survey is sufficient identification seems to have been the construction placed upon these grants by Congress itself. A survey is merely an act of the political department serving to identify what was before floating unidentified.

Cooper v. Roberts, 18 How. 173.

It cannot reasonably be claimed that upon the filing of the plat in the General Land Office, and after the school lands in the State of Oregon were definitely ascertained, the government of the United States could deprive the State of these school lands, and in the order of withdrawal describe them according to the government survey.

The United States, by the enabling act of 1859, absolutely obligated itself to convey sections 16 and 36 to the state, at least when those sections were definitely ascertained, and it would be a breach of the government's agreement to withdraw these lands after they had been identified, and after that identification was recognized by the government as correct in the very order of withdrawal.

The policy of the government with reference to school lands has been liberal, and school land grants have been liberally construed. From the ordinance of 1787, which contained the memorable words: "Religion, morality and knowledge being necessary to government and the happiness of mankind, schools and the means of education shall forever be encouraged", it has been the policy of the United States to grant to each state as it was organized section sixteen in each township, for the use of schools.

Cooper v. Roberts, 18 How. 173, 177.

From 1848 the grant has been of sections sixteen and thirty-six (see appendix to this brief for statement of grants to states and territories for school purposes).

Congress did not intend by the various Oregon Acts to play fast and loose with Oregon with reference to the school lands. Congress did not intend that after these school lands were ascertained by survey, the officers of the United States might withhold approval of the survey, and while so doing examine the lands to determine what sections granted to the state it would be advantageous to the government to withdraw, and then to withdraw those sections *by identification according to the survey.*

If these lands were located and ascertained by the survey sufficiently to enable the United States govern-

ment to withdraw them by description according to and as fixed by that survey, they were certainly located and ascertained sufficiently to have title to them vest in the State of Oregon.

The various letters of the Commissioner and of the heads of other government departments, as well as the order of withdrawal, described lands in the State of Oregon, including section sixteen herein involved, according to the survey that had been made and filed. In so describing them, the government recognized that these lands had been identified and located and that therefore sections 16 and 36 no longer belonged to the United States. If they had not been definitely ascertained and located by the survey then on file in the office of the Commissioner of the General Land Office, officials of the United States would not in the order of withdrawal, have described them according to that survey.

By the Act of Congress of February 28, 1891, amending Section 2275 of the Revised Statutes (26 Stats. 796), it is provided that in case of a conflict between settlers and the state over school sections, if the settlement was made *before the survey of the lands in the field* the claim of the settler shall have priority, and that on the other hand, if the settlement was made after the survey in the field, the implication necessarily is that the claim of the state has priority. It is not perceived why the rule laid down by Congress for the settlement of disputes between the state and settlers is not equally applicable for the settlement of disputes between the state and itself.

E.

Immediately upon the formal approval of the Survey, the Statutory Reservation and Grant originally made to Oregon destroyed the effect of the temporary withdrawal and vested title in the State.

Even if the withdrawal by the Secretary of the Interior had force, that was a temporary withdrawal. The subsequent approval of the survey (Jan. 31, 1906) by the General Land Office would apply to these lands the statutes of 1848 and 1859, which being of higher dignity and greater scope than an executive withdrawal would supersede it and vest the lands in the State of Oregon. The act of August 14, 1848 (9 Stats. 323), is absolute in its terms "that when the lands in the said territory shall be surveyed under the direction of the government of the United States preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be and *the same is hereby reserved* for the purpose of being applied to schools in said territory."

This act is without exception or qualification. It has never been repealed. The moment the survey was made "preparatory to" putting the public lands on the market —not when all preparations to that end were completed —the act operated to reserve the lands in question from any other use whatsoever, and, with the granting act, operated to vest title in the state. Certainly it cannot be contended that a mere executive act could have the effect of repealing those statutes. The statutes operate the minute the conditions prescribed exist. The prescribed conditions, under all contentions of the government, existed January 31, 1906.

As hereinbefore stated, it is well settled that the action of the Land Department cannot override the ex-

pressed will of Congress, or convey away public lands in disregard or defiance thereof.

Burfenning v. Railroad Co., 163 U. S. 323, and cases cited on page 28 herein.

F.

The Lands had not been "Sold or otherwise Disposed of" when the Survey was formally approved on January 31, 1906, and title therefore vested in the State of Oregon on that date, if not before.

The Enabling Act of February 14, 1859, admitting Oregon as a state, provided in part as follows:

> "That the following propositions be and the same are hereby offered to the said People of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory upon the United States and upon the State of Oregon, to-wit: First. That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been *sold or otherwise been disposed of*, other lands equivalent thereto and as contiguous as may be shall be granted to said state for the use of schools."

If the grant was not a grant *in praesenti, and if* formal approval of the survey was essential to vest title in the State of Oregon, then it is clear that under the terms of the enabling act, Oregon became absolutely entitled to sections sixteen and thirty-six on January 31, 1906, when the survey was formally approved; unless the lands in question had been *"sold or otherwise disposed of"*. For such the state was to get equivalent lands.

Had section sixteen of town three (3) north, range six (6) east been "sold or otherwise disposed of" on Jan-

uary 31, 1906, when the survey was formally approved? Section sixteen had been "withdrawn from all forms of *disposition* whatever, except under the mineral laws" for forestry purposes by the Secretary of the Interior. But no sale had been made of it. No rights of settlers had attached to it. And the United States still claimed to have absolute title to it, unincumbered by claims or liens of any kind.

Under such circumstances section sixteen had not been "sold or otherwise disposed of."

Ham. v. Missouri, 59 U. S. (18 How.) 126.

In this case it was held that the words "otherwise disposed of" as used in Act of Congress March 6, 1820 (3 Stats. 547), granting to the state of Missouri for the use of schools the sixteenth section of every township in the state which had not been "sold or otherwise disposed of", signifies some disposition of the property equally efficient with a sale; which necessarily signifies a legal sale by competent authority, a disposition final and irrevocable of the land, and equally incompatible with any right in the state, present or potential.

The facts in the case, briefly stated, were these:

Plaintiff claimed rights in certain lands situated in section sixteen in a township in Missouri. The state of Missouri claimed title through an alleged concession made by the Lieutenant Governor of Upper Louisiana in 1801. This alleged concession was rejected in 1811 by the Board of Commissioners appointed to ascertain the rights of persons claiming lands in the territory of Louisiana, but in 1828, Congress, relinquished to claimants what title the United States had, and a patent was issued.

The state claimed title by virtue of Act of March 3, 1820 (3 Stats. 545), authorizing the people of Missouri

to form a constitution and state government, and providing in section 6:

> "That the following propositions be and the same are hereby offered to the convention of the said territory of Missouri, when formed, for their free acceptance or rejection, which if accepted by the convention, shall be obligatory upon the United States; *First:* That section numbered sixteen in every township, and *when such section has been sold or otherwise disposed of*, other lands equivalent thereto and as contiguous as may be, shall be granted to the state for the use of the inhabitants of such township for the use of schools."

The provisions of this act were accepted by the people of Missouri on July 19, 1820.

The plaintiff in error claimed that the lands included in the early Louisiana claim were excepted from the grant of school lands, because of certain provisions of the act of March 3, 1811. (2 Stat. 662.) By the tenth section of this act, which authorized the President of the United States to offer for sale such portions of the public lands in Louisiana as should have been surveyed, it was providede that,

> "All such lands, with the exception of section number sixteen, which shall be reserved in each township for the use of schools, shall be offered for sale to the highest bidder, under the direction of the Register of the Land Office, the receiver of public moneys, and principal deputy surveyor."

The tenth section also contained a proviso,

> "That until after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time and according to law presented to the recorder of land titles in the District of Louisiana, and filed in his office for the purpose of being investigated by the Commissioners appointed to ascertain the rights of persons claiming lands in the territory of Louisiana."

The plaintiff in error claimed that the provisions of this tenth section reserved from sale the lands included in his Louisiana claim, and that they therefore did not pass under the grant to the state in 1820, having been previously "sold or otherwise disposed of".

The Supreme Court of the State of Missouri held that, although the land claimed by the proprietors of the Louisiana grant was, by the several acts of Congress, reserved from sale, yet such reservation was not such a "disposition of said lands by the government as was within the saving clause of the sixth section of the act of 1820, and could not operate to prevent the title from vesting in the state by virtue of such grant".

On a writ of error to this Court, the decision of the lower court was affirmed on several grounds, one of which was that, at the time of the grant to the state in 1820, the lands had not been previously "sold or disposed of" within the meaning of the Missouri school grant act. This Court said on this point:

> "The language and plain import of the 6th section of the act of the 3d of March, 1820, confer a clear and positive and unconditional donation of the sixteenth section in every township; and, when these have been sold or otherwise disposed of, other and equivalent lands are granted. Sale, necessarily signifying a legal sale by a competent authority, is a disposition, final and irrevocable, of the land. The phrase "or otherwise disposed of" must signify some disposition of the property equally efficient, and equally incompatible with any right in the State, present or potential, as deducible from the act of 1820, and the ordinance of the same year. Upon any other hypothesis, the right to the sixteenth section would attach under the provision of the act of 1820; the State would still have the title, and could recover the section specifically, and there would be no necessity for providing for an equivalent for that section."

It would seem clear that under this decision, and under the express language of the enabling act of February 14, 1859, the lands had not been "sold or otherwise been disposed of" by the United States on January 31, 1906, when the survey was formally approved. Not having been "sold or otherwise been disposed of", title to the specific sections passed to the state on that date, if not before, and thereafter the government had nothing it could reserve or withdraw.

Platt v. Union Pacific R. R., 99 U. S. 48

In this case the land grant to the railroad provided that all lands granted by the act, which had not been "sold or otherwise disposed of" by the railroad within three years after the completion of its line should be open to preemption and entry. Before the railroad was completed it had mortgaged its grant. The court held that a mortgage of the lands was a "disposition" which rendered unavailing the statutory provision that the lands should be open to preemption and entry. See also

Connelly v. State, 85 Ga. 348.
Roberson v. State, 100 Ala. 37.
Maxwell v. State, 140 Ala. 131.

The rule to be derived from these cases is that the words "sold or otherwise disposed of" mean either a technical sale or a disposition of the lands which is the substantial equivalent of a sale.

A "reservation" to the grantor, is not a "disposition" within this rule.

G.

The alleged Executive Withdrawal of these Lands, made December 16, 1905, was of no force.

The withdrawal of December 16, 1905, was of no force because if the lands were then surveyed the school land grant had attached, and if they were not surveyed there was no right to withdraw them for forest purposes.

> "There can be no reservation of public lands from sale except by reason of some treaty, law or authorized act of the executive department of the government."
>
> Wolsey v. Chapman, 101 U. S. 769.

The acts of the heads of departments within the scope of their powers are in law the acts of the president.

> Idem.
>
> Wilcox vs. Jackson, 13 Peters, 498.

The sole laws authorizing the President to create forest reserves and to withdraw lands for that purpose, are Section 24, Act of March 3, 1891, 26 Stats. 1103 as amended by the act of June 4, 1897, 30 Stat. 3436, and it is under these acts that the reservation for forest uses purports to have been made. (See proclamation of Jan. 25, 1907.) By the acts above cited, the President can set aside only "public lands." See statutes cited above.

> United States v. Blendauer, 122 Fed. 704.

"Public lands" are only such as are open to sale or other disposition under general laws.

> Newhall v. Sanger, 92 U. S. 761, 763.
>
> Bardon v. Northern Pac. R. R., 145 U. S. 535, 538.
>
> Barker v. Harvey, 181 U. S. 490.

1909 U. P. R. R. Co. v. Harris, 215 U. S. 338.

> "What is meant by 'public lands' is well settled. * * * 'The words * * * are habitually used in

> our legislation to describe such as are subject to sale or other disposal under the general laws'. * * * If it is claimed in any given case that they are used in a different meaning, it should be apparent either from the context or from the circumstances attending the legislation."

Lands are not "public lands", i. e., not open to sale or other disposition under general laws until they are surveyed.

> Barnard v. Ashley, 18 How. 43, 46.
> Hosmer v. Wallace, 97 U. S. 575, 579.
> Buxton v. Traver, 130 U. S. 232, 235.

Now, if the withdrawal or reservation for forest uses can only be made of surveyed lands, i. e., "public lands," then if these lands were unsurveyed on December 16, 1905, as the government now claims, the Secretary of the Interior's withdrawal of that date was unavailing. On the other hand, if on that date the lands in question were surveyed lands, i. e., "public lands," the Secretary of the Interior's withdrawal was equally unavailing, for the reason that the reservation of 1848 and the grant of 1859 took effect on these specific lands as soon as they were identified by survey.

Again, the Secretary's withdrawal was of "vacant, *unappropriated public lands.*" Govt's Exh. A, Dec. 16, 1905. If these lands were then unsurveyed as claimed by complainant they were not "public lands" and hence not within the terms of the order of withdrawal.

If the lands were then surveyed as we claim, they had *ipso facto* ceased to be "unappropriated." They were expressly "appropriated" to the school grant.

Therefore by the very language of the order of with drawal, they were not included.

H.

(A) The Presidential Proclamation of January 25, 1907, was of no force as far as the lands in question were concerned.

The proclamation of January 25, 1907, did not affect these lands because—

(a) At that time the grant was vested in the state of Oregon, and

(b) The proclamation itself expressly excepts the lands in question.

As we have seen, the surveys were approved by the land office January 31, 1906, and by the statute of 1848 the lands were immediately reserved for the use of schools and passed to Oregon under the grant of 1859.

Where lands have been previously reserved or appropriated no subsequent law or proclamation will be construed to embrace them or to operate upon them, although no exception be made in the subsequent proclamation or law.

> Bardon v. Northern Pacific, 145 U. S. 535, 539.
> Railroad v. Roberts, 152 U. S. 114, 119.
> U. S. v. Blendauer, 122 Fed. 703, 708.

(B) The President's proclamation expressly excepted from the lands withdrawn those lying in sections 16 and 36.

The proclamation of the President withdrawing certain lands in Oregon and including them in the Cascade Range Forest Reserve excepted from the force and effect thereof:

> "All lands which are at this time embraced in any legal entry or covered by any lawful filing or selection duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and also excepting *all lands which at this*

> *date are embraced within any withdrawal or reservation for any use or purpose* to which this reservation for forest uses is inconsistent". (Government's Exhibit B, not printed in record, but returned for inspection.)

The lands involved in this case were a part of section 16 in one of the townships covered by the proclamation. Sections 16 and 36 in the State of Oregon were by the act of 1848 organizing the territory of Oregon

> "reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be created out of the same."

And the enabling act of 1859 admitting Oregon into the Union, granted to the State for the use of schools

> "Sections numbered sixteen and thirty-six in every township of public land in said state."

The reservation of sections 16 and 36 as school land in the act of 1848, and the grant of such lands to the state by the enabling act, was clearly a "*withdrawal or reservation*" of such lands for a "use or purpose to which this reservation for forest uses is inconsistent" within the meaning of the President's proclamation.

In the court below, counsel for the United States contended that the "withdrawals" or "reservations" referred to were only withdrawals for governmental purposes, such as Indian Reservations, Fish Hatcheries, Military Reservation and the like. The fallacy of this contention lies in the fact that the President did not so limit the operation of the excepting clause. Had the President intended any such result, it must be presumed that he would have used appropriate terms to carry out that intention. The proclamation would then have read:

> "All lands embraced within any withdrawal or reservation for *governmental purposes* to which this reservation for forest uses is inconsistent."

Instead, however, of so limiting the exception, the proclamation says:

> "*All lands* embraced within *any* withdrawal or reservation *for any use or purpose* to which this reservation for forest uses is inconsistent."

The lands involved in the case at bar clearly fall within this exception. The reservation of these lands for school purposes by the act of 1848 was certainly a "reservation" of them for "a use or purpose", to which the reservation for forest uses made by the proclamation was inconsistent. It was clearly the intent of the President, as evidenced by the language used in the proclamation, to except from the withdrawal for forest uses all lands which had previously been dedicated to other and inconsistent uses.

Section 16 had been reserved and granted to the State of Oregon, and unless the proclamation of the President clearly shows that the withdrawal for forest reserves was intended to cover the lands previously reserved and granted to the State of Oregon, it cannot be held to cover such lands. It cannot be presumed that the President would attempt to dispose of lands which had been previously reserved and granted to the State of Oregon, and which had been identified and located by an approved survey prior to the date of the proclamation unless such intent is clearly shown. Not only is such intent not clearly shown by the proclamation in this case, but that proclamation, in terms, excepts from its operation, the very lands in question.

If there is any doubt as to the meaning of the excepting clause of the proclamation, that doubt must be resolved in favor of the State of Oregon, because it must be presumed that the United States would not devote to other purposes lands which it had previously reserved and granted to the State of Oregon.

Counsel for the United States argued in the court below that a national forest, to be properly administered,

should be in a compact body, and there was therefore no reason why the President should have excepted sections 16 and 36, which would thereby entail a divided authority over the lands within the outer boundaries of the forest. The same reasoning applies to the lands within the Forest Reserve to which right of settlers had attached, yet such lands were also excepted from the forest reserve.

It was clearly the intent of the President, as evidenced by the language of the proclamation, to except from its operation,—

First. All lands to which entry rights had attached.

Second. All lands which had previously been withdrawn or reserved for any use or purpose, state or national, inconsistent with the withdrawal then made.

The second exception clearly covered sections 16 and 36 which had previously been reserved and granted to the State of Oregon for school purposes.

The presidential proclamation was unavailing for another reason. At the time it was made the lands had been surveyed, the survey approved and the plat of survey filed in the local land office. The moment that had been done the prior congressional reservation and grant of 1848 and 1859 operated to reserve and grant these lands to the use of the Oregon schools. And, under the rule hereinbefore alluded to, that no statute or proclamation will be held to include lands previously reserved or appropriated, the Presidential proclamation was of no force as far as these lands were concerned.

We respectfully submit that the decree of the Circuit Court of Appeals should be affirmed.

MARK NORRIS and
OSCAR E. WAER,
of Counsel for Appellee,
Sligh Furniture Company.

APPENDIX.

Act of the Legislative Assembly of the People of Oregon Accepting the Provisions of the Enabling Act of February 14, 1859 (11 Stats. 383):

AN ACT

Relative to Certain Propositions made by the Congress of the United States to the People of The State of Oregon.

Preamble.

Whereas, the congress of the United States did pass an act, entitled 'An act for the admission of Oregon into the Union,' approved the fourteenth day of February, one thousand eight hundred and fifty-nine; which said act contains the following propositions for the free acceptance or rejection of the people of the state of Oregon, in the words following: '§ 4. The following propositions be and the same are hereby offered to the said people of Oregon, for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said state of Oregon, to-wit: *First*, That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold, or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools. *Second*, That seventy-two sections of land shall be set apart and reserved for the use and support of a state university, to be selected by the governor of said state, subject to the approval of the commissioner of the general land office, and to be appropriated and applied in such manner as the legislature of said state may prescribe for the purpose aforesaid, but for no other purpose. *Third*, That ten entire sections of land, to be selected by the governor of said state, in legal subdivisions, shall be granted to said state for the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of the legislature thereof. *Fourth*, That all salt springs within said state, not exceeding twelve in num-

ber, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said state, the same to be selected by the govenor thereof, within one year after the admission of said state, and when so selected, to be used or disposed of on such terms, conditions, and regulations as the legislature shall direct; *provided*, that no salt spring or land, the right whereof is vested in an individual or individuals, shall by this article be granted to said state. *Fifth*, That five per centum of the net proceeds of sales of all public lands lying within said state, which shall be sold by congress after the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to said state for the purpose of making public roads and internal improvements, as the legislature shall direct; *provided*, that the people of Oregon shall provide by ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall nonresident proprietors be taxed higher than residents. *Sixth*, And that the said state shall never tax the lands or the property of the United States in said state; *provided, however*, that in case any of the lands herein granted to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act;' therefore—

§1. *Propositions of Congress Accepted.*

That the six propositions offered to the people of Oregon in the above-recited portion of the act of congress aforesaid be, and each and all of them are hereby, accepted; and for the purpose of complying with each and all of said propositions hereinbefore recited, the following ordinance is declared to be irrevocable without the consent of the United States, to-wit:

Be it ordained by the legislative assembly of the state of Oregon, That the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find necessary for securing the title in said soil to the

bona fide purchasers thereof; and that in no case shall nonresident proprietors be taxed higher than residents; and that the said state shall never tax the lands or property of the United States within said state.

Approved, June 3, 1859.

1 Lord's Oregon Laws, pp. 28, 29.

List of the grants to States and reservations to Territories for School Purposes.

States and Territories.	Dates of Grants.	
Section 16.		
Ohio	April 30, 1802.	(2 Stat. 173.)
Indiana	April 19, 1816.	(3 Stat. 290.)
Illinois	April 18, 1818.	(3 Stat. 428.)
Missouri	March 6, 1820.	(3 Stat. 545.)
Alabama	March 2, 1819.	(3 Stat. 489.)
Mississippi	March 3, 1803.	(2 Stat. 229.)
	May 19, 1852.	(10 Stat. 6.)
	March 3, 1857.	(11 Stat. 200.)
Louisiana	April 21, 1806.	(2 Stat. 391.)
	Feb. 15, 1843.	(5 Stat. 600.)
Michigan	June 23, 1836.	(5 Stat. 59.)
Arkansas	June 23, 1836.	(5 Stat. 58.)
Florida	March 3, 1845.	(5 Stat. 788.)
Iowa	March 3, 1845.	(5 Stat. 789.)
Wisconsin	Aug. 6, 1846.	(9 Stat. 56.)
Sections 16 and 36.		
California	March 3, 1853.	(11 Stat. 246.)
Minnesota	Feb. 26, 1857.	(11 Stat. 166.)
Oregon	Feb. 14, 1859.	(11 Stat. 383.)
Kansas	Jan. 29, 1861.	(12 Stat. 126.)
Nevada	March 21, 1864.	(13 Stat. 30.)
Nebraska	April 19, 1864.	(13 Stat. 47.)
Colorado	March 3, 1875.	(18 Stat. 474.)
Washington Territory	March 2, 1853.	(10 Stat. 172.)
New Mexico Territory	Sept. 9, 1850.	(9 Stat. 446.)
	July 22, 1854.	(10 Stat. 308.)
Utah Territory	Sept. 9, 1850.	(9 Stat. 453.)
Dakota Territory	March 2, 1861.	(12 Stat. 239.)
Montana Territory	May 26, 1864.	(13 Stat. 85.)
Idaho Territory	March 3, 1863.	(12 Stat. 808.)
Wyoming Territory	July 25, 1868.	(15 Stat. 178.)

States:

North Dakota	Feb. 22, 1889.	(25 Stat. 676.)
South Dakota	Feb. 22, 1889.	(25 Stat. 676.)
Montana	Feb. 22, 1889.	(25 Stat. 676.)
Washington	Feb. 22, 1889.	(25 Stat. 676.)
Wyoming	July 10, 1890.	(26 Stat. 222.)
Utah	July 16, 1894.	(28 Stat. 107.)
Oklahoma	June 16, 1906.	(34 Stat. 272.)

UNITED STATES OF AMERICA

THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,
Appellant,

vs.

W. J. MORRISON, FINLEY MORRISON, AND THE SLIGH FURNITURE COMPANY, A CORPORATION,
Appellees.

No. 28183
Docket No. 135—
October Term, 1915

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLEES, W. J. AND FINLEY MORRISON.

(Supplementary to Brief of Counsel for Appellee, Sligh Furniture Company.)

RICHARD SLEIGHT,
Attorney for Appellees, W. J. and Finley Morrison.

UNITED STATES OF AMERICA

THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,
Appellant,

vs.

W. J. MORRISON, FINLEY MORRISON, AND THE SLIGH FURNITURE COMPANY, A CORPORATION,
Appellees.

No. 24193
Docket No. 138—
October Term, 1915

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLEES, W. J. AND FINLEY MORRISON.

(Supplementary to Brief of Counsel for Appellee, Sligh Furniture Company.)

STATEMENT.

The land in question in this case was deeded to the appellees, W. J. and Finley Morrison, by the State of Oregon and they subsequently conveyed it to the appellee, Sligh Furniture Company. This brief is intended as a supplementary argument to that contained

in brief of counsel for Sligh Furniture Company, consequently we will not repeat the statement of facts which are correctly outlined in the brief of Sligh Furniture Company contained on pages 1-10 inclusive of such brief.

ARGUMENT.

I.

The grant of Section 16 to the state irrevocably pledged this land to the state, and placed it beyond the power of Congress or the President to divert it to other purposes.

In Beecher v. Weatherby, 95 U. S. 517, it was held that under a grant of section 16 to Wisconsin for school purposes, couched in the same terms as the grant to Oregon, the title became vested in the state, and the land could not be appropriated to any other purpose. The court said (page 528):

> "It was therefore an unalterable condition of the admission, obligatory upon the United States, that section 16 in every township of the public lands in the state, which had not been sold or otherwise disposed of, should be granted to the state for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the state upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case the lands which might be embraced with-

in those sections were appropriated to the state. *They were withdrawn from any other disposition, and set apart from the public domain,* so that *no subsequent law* authorizing a sale of it could be construed to embrace them, and all that could be legally done under the compact was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. *They could not be diverted from their appropriation to the state.* * * * * In this case the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. With this identification of the section the title of the state, upon the authority cited (Cooper v. Roberts, 18 How. 173), became complete, unless there had been a sale or other disposition of the property by the United States *previous to the compact with the state.* No *subsequent* sale or other disposition, as already stated, could defeat the appropriation."

The decision in the case above cited followed former decisions of this court in other cases, where similar grants to Michigan and Missouri had been made of section 16 for school purposes.

Cooper v. Roberts, 18 How. 173.

Ham v. Missouri, 18 How. 126.

In Schneider v. Hutchinson, 35 Ore. 253, the same conclusion was reached, the court by Mr. Justice Bean

(now one of the Federal Judges in Oregon) using the following language with reference to the right to divert to other purposes the lands granted for the use of schools (page 238):

> "Again it is contended that the land in question was granted to the state by the general government for the use of schools as upon a condition subsequent, and that upon its application to other purposes the United States has the right to re-enter and take possession, and against this right the statute of limitations does not run, and therefore no person can acquire title to such lands by adverse possession prior to its alienation by the state. The vice of this position lies in the fact that the grant to the state is not upon a condition subsequent, but it is an absolute grant, vesting the title in the state for a special purpose. The language of the act of Congress is that such land 'shall be granted to the state for the use of schools,' and the *United States has no right to re-enter for any reason whatever.*"

It is clear, therefore, that if the land which, upon a survey being made is found to be embraced in Section 16, constituted a part of the public domain at the time of the grant, it was by the grant set apart from the public lands and given irrevocably to the state for the use of schools, so that the government could not afterwards divert it to any other purpose, or do anything whatever with respect to it except to survey it.

Has the rule announced in Beecher v. Weatherby and Cooper v. Roberts been departed from or overruled in Minnesota v. Hitchcock or any other case?

No doubt the appellant will contend that the govern-

ment has the right to dispose of any of the lands in sections 16 and 36 at any time before the survey has been approved by the department, and will rely upon Minnesota v. Hitchcock, 185 U. S. 373, and Heydenfeldt v. Daney Gold M. Co., 93 U. S. 634, in support of that contention, for the government cannot prevail in this suit upon any other theory. It therefore becomes important to examine those cases and see whether there is any irreconcilable conflict between them and the authorities above cited. Upon such examination the court will find that instead of being in conflict with the cases cited by us they are in entire harmony with them, and that they still further confirm the opinion that under the circumstances of this case the appellant cannot prevail in this suit.

The main feature of the Hitchcock case lies in the fact that the lands in question there were Indian lands in which the Indians' right of occupancy had never been extinguished except by treaty in which it was expressly provided that the lands should be sold for the express benefit of the Indians, the money derived from the sales to be paid to them at stated intervals through a long period of years. This court held that under the treaty which ceded the lands upon these terms the lands were Indian lands *and not a part of the public domain*, and when they were ceded upon these express terms they became thereby impressed with a trust in favor of the Indians, and therefore never became a part of the general public domain upon which the school grant could operate. This is not only in accord with the doctrine laid down in Beecher v. Weatherby, but necessarily

follows from the rule there established, that the school grant could only operate upon lands constituting a part of the public domain. In Minnesota v. Hitchcock, at page 393, this court said:

> "But considerations may arise which will justify an appropriation of a body of lands within the state to other purposes, and *if these lands have never become public lands* the power of Congress to deal with them is not restricted by the school grant, and the State must seek relief in the clause which gives it equivalent sections. If, for instance, Congress in its judgment believes that within the limits of an Indian reservation or unceded Indian country—*that is, within a tract which is not strictly public lands*—certain lands should be set aside for a public park, or as a reservation for military purposes, *or for any other public uses,* it has the power, notwithstanding the provisions of the school grant section. So it is that when Congress came in 1889 to make provision for this body of lands it could have by treaty taken simply a cession of the Indian rights of occupancy, *and thereupon the lands would have become public lands and within the scope of the school grant.*"

It will be seen that the distinction which we are pointing out between the cases of Beecher v. Weatherby and Cooper v. Roberts on the one hand and Minnesota v. Hitchcock and similar cases on the other, is not a fanciful one created by ourselves, but is one which was carefully kept in mind by the court throughout all these decisions, and is necessary to be observed in order to reconcile decisions which would otherwise appear to be out of harmony with each other. That the court did

not consider the doctrine laid down in Beecher v. Weatherby as at all weakened by the conclusion reached in Minnesota v. Hitchcock is clearly evident from the fact that it distinguished the former case upon the express ground that in the Beecher case the lands embracing the school sections had been entirely freed from the Indians' claims, and had *thus become public domain* upon which the school grant could operate, while in the Hitchcock case the lands had, by treaty with the Indians prior to the admission of Minnesota as a state, been impressed with a trust by which they were to be sold for the benefit of the Indians, the proceeds of the sales to be paid to them for a long period of years, and that on account of their devotion to this purpose the lands *were not a part of the public domain* and hence that the school grant was not operative therein. There is no incompatibility between these decisions, nor was the former overruled by the latter, but on the contrary it was carefully distinguished from it upon the grounds stated. (185 U. S. 394-399.) We therefore find the court, in the Hitchcock case, carefully guarding against possible misapprehension of its position by using the qualifying phrase "and if these lands have never become public lands." (Page 394). This was in order to confine the conclusion reached to the facts of that particular case, in which the lands had never become public lands because the Indian right of occupancy had never been extinguished except by the treaty, which provided that the lands should be impressed with a trust whereby they should be sold exclusively for the benefit of the Indians, a purpose altogether inconsistent with their being de-

voted to the use of schools by the State. And it should be observed that this Indian right *accrued before the grant to the state.* In fact, the Indian right had always existed; the treaty simply recognized this previously existing right, and contained provisions by which the United States agreed to secure it by money payments to the Indians, to be derived from the sale of lands which belonged to the Indians, not to the public domain. This land therefore never was a part of the public domain, hence no school land could be "set apart from the public domain" out of it. The court could not well have reached a different conclusion in the Hitchcock case without declaring a direct breach of faith on the part of the government under the treaty with the Indians, and the decision emphasizes this point and lays stress upon the fact that a liberal interpretation was placed upon the treaty in that case because it was one made with a simple minded people who would not have understood the language used in any other than its ordinary sense.

Nor is Heydenfeldt v. Daney Gold M. Co., 93 U. S. 634, in conflict with Beecher v. Weatherby, 95 U. S. 517, or with the distinction above pointed out, and it is clear that the court did not so consider it, for the former case was cited by counsel in the latter, but was not considered by the court to be of sufficient bearing to be referred to in the opinion, although the Beecher decision was rendered a year later than the Heydenfeldt decision.

Consquently we confidently assert that the rule of Beecher v. Weatherby remains in full force and applies

directly to the circumstances of this case, while the doctrine of Minnesota v. Hitchcock has no bearing here at all. In the former case it was distinctly held that when lands, which upon a subsequent survey might be found to be embraced in section 16 constituted a part of the public domain at the time of the grant, they were by such grant "withdrawn from any other disposition and set apart from the public domain" and that "no subsequent law" could divest the title of the state; that "they could not be diverted from their appropriation to the state"; and that the title to the state became complete unless there had been a sale or other disposition of the property by the United States "previous to the compact with the state." If this language means what it says (and it has never been qualified or overruled) then there is no escape from the proposition that the attempt to reclaim to the government the lands in question here, under the guise of an appropriation for forestry purposes, is altogether illegal and unwarranted.

According to our view the question in dispute is not whether the grant under consideration was in *presenti* or in *futuro*, but rather it is this: What was the intention of Congress when it granted these school lands to the State, and what was the intention of Congress when it authorized the President to create Forest Reservations, and what was the intention of the President when he created the reservation in question here?

From the authorities cited above it is clear that this court does not place a strict construction on the formal terms of the grant in order to determine whether or not it is in *presenti* or in *futuro*. For example in the Hey-

denfeldt case, a grant which was in terms in *presenti* was held to be in *futuro,* while in the Beecher case, a grant which was in terms in *futuro* was held to be, in fact, in *presenti.* In all the cases the court has determined the question of intent from all the surrounding circumstances as well as from the language of the grant itself, and has clearly settled a definite policy of the construction of these grants and determined that grants of school lands to the state worded like the Oregon grant, are considered to be an *irrevocable pledge* of these lands to the state for the purpose named. In no case has the court ever held that Congress could afterwards give this land away to any person. The only cases which seem to declare such a result are those which are decided upon broad grounds of public policy, like the Hitchcock case, where the court held that the lands were not embraced in the grant because they in reality belonged to the Indians, and that the Indians had a prior right to the lands existing before the grant to the state, and that their right had never been extinguished. In the Heydenfeldt case, the court reached the conclusion that the lands were not embraced in the grant because it was clear that they were not intended to be so included, and that to hold otherwise would result in destroying the principal industry of the State of Nevada.

No case can be cited where the Government has attempted to take away school lands *for its own purposes.* The only instances where the school grant is held to be superseded by a superior right are where settlers have settled on the lands before survey, or where the lands have never become public domain as in the

Hitchcock case. The Act of February 21, 1891, was passed primarily for the purpose of preserving the right of settlers who had settled *before any surveys were made* and who could not tell until after the survey on what definite subdivisions or sections their settlement was made. Presumably in the interests of settlements and the development of the public domain the act of February, 1891, was passed, and the court has placed a liberal construction upon it, especially in view of the fact that the state has a right under the Act to select other lands in lieu of the lands settled on.

But it should be remembered that the attempt in this case to take these lands away from the state is made after the state had in fact deeded them as state lands, and after they had gone into the hands of an innocent purchaser for value, *and after the lands had been surveyed in the field*, and that this attempt is made by subordinate officials in the Forestry Department of the Government. But this court takes a broader view of such questions, and under the circumstances here it would seem that the court would adhere to the doctrine laid down in the Beecher case, that when these lands were granted to the State of Oregon they were irrevocably set apart from the public domain for school purposes, and that it was beyond the power of Congress to authorize their being utilized afterwards for forest reservation purposes, and that under the wording of this proclamation the president never intended to set aside any school lands as constituting a part of this reservation.

The Government will in no way be prejudiced by failure to recover these lands, because the case of Hib-

bard vs. Slack, cited below, conclusively shows that although lands may be embraced within the outer limits of a reservation they do not necessarily constitute a part of it, and the court will observe that the township in question, in which the lands involved in this case are situated, is the outside township of this reservation, and section 16 is almost on the outside of the limits of the reservation.

There are many other school sections similarly situated, not only in this state, but in other states, and if the court should hold that these lands did not belong to the state, not only the appellants in this case but also many other innocent purchasers must suffer by such a construction.

II.

As we have seen above, the appellees claim that the state's title became perfect at the time of the grant, the government having nothing further to do than to identify the land by a subsequent survey. When such survey was made the title related back to the time of the grant.

Does the title pass to the state only upon a survey being made; and if so does this mean a survey in the field or only when the survey is finally approved?

As to when the survey is considered sufficiently complete to operate as a segregation of the land from the public domain so as to cut off the rights of all persons except the state, is made plain by legislative enactment and judicial construction.

Section 2275 Revised Statutes as amended by the

Act of February 25, 1891, providing for the selection by the state of other lands in lieu of those situated in school sections which have been settled upon, provides that if the settlement is made "before the survey of the lands in the field" the lands shall be subject to the claims of settlers. It further provides that other lands of equal acreage are also appropriated where the school lands "are mineral land, or are included within any Indian, military, or other reservation." Is there any plausible reason why, under this statute, it should be claimed that the time of the survey in the field should be held to be the criterion applying to settlers while a different time is applied to withdrawals for Indian or forestry reservations or other purposes? We think no such construction can be placed upon the statute. If, then, the criterion fixed by this statute is to be in force the appellant's case here must fail, for the survey of this section in the field was complete several years before any attempt to withdraw the lands in suit.

In Hibbard v. Slack, 84 Fed. 571, in an exhaustive and elaborate discussion of the effect of the Act of 1891 (R. S. Sec. 2275) the Court of Appeals held that the state could not select indemnity lands in lieu of school lands which, after they had been surveyed in the field and the title thereby become fixed in the state, were included within the exterior boundaries of a forest reservation; also that the title to school lands became so vested in the state by a survey in the field that they were not thereafter subject to the disposal of Congress, and although included within the exterior limits of a forest reservation did not form a part of the reservation. In

deciding this case the court applied the criterion of time fixed by the statute with respect to settlers, viz., "before the survey in the field" to the provisions relating to the disposal of the land for reservations or other purpose, and this is doubtless the correct construction. The court said (p. 574):

> "In construing the Act of February 28, 1891, there are certain well established principles of law applicable to school sections, which should constantly be borne in mind, as follows: First, Title to school section, if unencumbered at date of survey, then vests absolutely in the state," (Citing cases). "And this is the principle recognized and acted upon by the Department of the Interior." (Citing cases.) "After title has thus vested the section is not subject to any further legislation by Congress. Therefore the school sections which were the bases of the selections of the lands sued for in the case at bar, although situated within the limits of forest reservations, are not parts of such reservations." (Citing cases.) "Second, *Until the surveys in the field* of the school sections, to-wit 16 and 36, the United States has full power of disposal over them."

The decisions of the Department, referred to in the foregoing opinion, were followed by the Supreme Court of California, which held that the title to school lands became vested in the state when the survey was made in the field.

Oakley v. Stuart, 52 Calif. 521, 535.

But even if the court should deem that the survey contemplated by law, as requisite to pass the title, was incomplete until approved by the Surveyor General, as was held in the later case of Medley v. Robertson, 55 Cal. 396, it would not change the result in this case, for the survey of this section 16 was so approved June 2, 1903, while no attempt at a withdrawal was made until December 16, 1905, when the Secretary's order was made, and the actual proclamation of withdrawal was not issued until January 25, 1907.

III.

Another objection to plaintiff's contention consists in the fact that the survey was finally accepted by the department January 31, 1906, and plat filed in the District Land Office February 7, 1906, nearly a year before the actual proclamation of withdrawal; and the same was accepted as originally made, without any change whatever. So that, under the doctrine of relation which has long been recognized by the courts as applying in questions of title, when the survey was so accepted it related back to its inception, and the title of the state vested under it as of the date of its completion in the field. (21 L. D. 410.)

And again, when the withdrawal was made it was a withdrawal *according to the said survey;* that is, a plat was attached to the proclamation showing this section to be surveyed and withdrawing the lands according to the descriptions on the plat. While we do not claim the government would be estopped by the acts of its officers, we nevertheless think this is of significance as showing the

construction of the department that this section was then surveyed land, following the uniform ruling that it was surveyed when the survey had been made in the field and approved by the Surveyor General.

IV.

But regardless of the question of when the survey shall be deemed to be made so as to vest title in the state, it would seem that there was no actual withdrawal of this section 16 by the proclamation of January 25, 1907, for by the terms of the proclamation these lands were in effect excepted from its operation. The language of the exception is as follows: "And also excepting all lands which at this date are embraced within any withdrawal or reservation for any use or purpose to which this reservation for forest uses is inconsistent."

This exception clearly recognizes the rule announced in Hibbard v. Slack, *supra*, that although lands may be embraced within the exterior limits of a reservation they are not necessarily thereby a part of it; and that the uses or purposes to which some of the lands so embraced may have been devoted or pledged may be inconsistent with their use for forestry purposes. This exception would seem to apply with as much or more force to school lands than to any other when it is considered that this court has so often and emphatically held that the grant to the state pledged the lands for that purpose, and set them apart from the public domain that they might be devoted to that use, and especially when it is remembered that the court has pursued a liberal policy with reference to these lands in order to maintain the good faith of the

government towards the state. So that we believe it was the expressed intention of the president to except school sections from the operation of the withdrawal.

V.

But there is a final objection to the maintenance of this suit by the appellant irrespective of all other questions, namely: that the Act of 1891 (Sec. 2275 as amended) expressly gives the state the right of election to select other lands in lieu of those in the school sections which have been embraced within a reservation, or to await the extinguishment of the reservation and the restoration of the lands therein embraced to the public domain *and then to take the specific lands in such sections 16 and 36.*

Rev. Stats., Sec. 2275 as amended.

United States v. Thomas, 151 U. S. 577, 583.

The State of Oregon never waived its right to the lands in question here by selecting or attempting to select other lands in lieu of them, but on the contrary it conveyed these lands to the appellants' grantors after they were surveyed, showing its intention to claim these specific lands. Consequently, even if it were held that these lands were legally set apart and form a part of this reservation, the appellees would nevertheless be entitled to await the extinguishment of the reservation and claim the specific lands in question. It follows therefore that

the appellant cannot prevail in a suit seeking to foreclose the appellees of their claim to the lands.

In every case involving the question of the right of a state to school lands under grants similar to the one in question, this court has pursued a liberal policy of awarding the lands to the state wherever it was possible to do so; and in every instance where it was not done it was due to some superior equity previously existing in a *third person,* not in the government; as in the Indians in the Hitchcock case, and in the miners in the Heydenfeldt case. Where no such equity existed the right of the state has been considered as accruing at the time of the grant, as in the Cooper and Beecher cases. No such prior equity exists here, and no monetary loss will fall upon anyone by denying the appellants' claim, but on the other hand great loss will be entailed upon the appellees here, who purchased from the state in good faith, as well as upon all other persons falling within the same class in this and other states who have made similar purchases from the state.

It is therefore respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

RICHARD SLEIGHT,

Attorney for Appellees, W. J. and Finley Morrison.